2002 REPORT OF THE SUPREME COURT

CIVIL PRACTICE COMMITTEE

January 15, 2002

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APPENDICES

Kindly note that copies of the above Appendices are available from the Administrative Office of the Courts
Civil Practice Division
P. O. Box 981
Trenton, NJ 08625-0981

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *R.* 1:2-2 — Trial Courts; Verbatim Recording of Proceedings

In response to the question of whether there should be a statewide approach to the issue of recording case management conferences, the Committee concluded that the case management order is sufficient memorialization and obviates the need to transcribe the conference. The Committee recommends that *R*. 1:2-2 be amended to include the case management conference as an exception to the requirement for verbatim proceedings.

The proposed amendments to *R.* 1:2-2 follow.

1:2–2. Trial Courts; Verbatim Record of Proceedings

In the trial divisions of the Superior Court and in the Tax Court, all proceedings in court shall be recorded verbatim except, unless the court otherwise orders, pretrial and settlement conferences, case management conferences, calendar calls, and ex parte motions. A verbatim record shall also be made of the content of an audio or video tape played during the proceedings, unless a transcript thereof is marked into evidence. The tape itself shall also be marked into evidence as a court's exhibit and retained by the court. Ex parte proceedings pursuant to *R.* 4:52 and *R.* 4:67 shall, however, be recorded verbatim subject to the availability of either a court reporter or a recording device. In the municipal courts, the taking of a verbatim record of the proceedings shall be governed by *R.* 7:8–8. Charge conferences, whether conducted in open court or in chambers, shall be recorded verbatim as required by *R.* 1:8-7(a).

Note: Source—*R.R.* 3:7–5 (first sentence), 3:7–10(d) (fifth sentence), 4:44–2 (first sentence), 4:44–5, 4:61–1(b). Amended June 20, 1979 to be effective July 1, 1979; amended December 20, 1983 to be effective December 31, 1983; amended July 26, 1984 to be effective September 10, 1984; amended January 5, 1998, to be effective February 1, 1998; amended July 10, 1998 to be effective September 1, 1998; amended July 5, 2000 to be effective September 5, 2000; amended to be effective ___.

B. Proposed Amendments to *R.* 1:4-8 — Frivolous Litigation

An attorney and Committee member pointed out a discrepancy between the Frivolous Litigation Statute and *R.* 1:4-8. Specifically, *R.* 1:4-8 requires all applications for fees to be filed "prior to the entry of final judgment" whereas the statute requires as a condition precedent to an award of fees that the applicant be denominated a "prevailing party." The Committee acknowledged the discrepancy and, to remedy it, recommends that *R.* 1:4-8(b)(2) be amended to provide that, where final judgment has been entered, an application for fees must be filed no later than 20 days from the date of entry of the judgment.

The proposed amendments to *R.* 1:4-8 follow.

1:4–8. Frivolous Litigation

(a) ...no change.

(b) Motions for Sanctions.

(1) ...no change.

(2) *Time for Filing; Attorney's Fees.* A motion for sanctions shall be filed with the court [prior to] within 20 days following the entry of final judgment[, notwithstanding the provisions of any other rule of court]. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorneys' fees incurred in presenting or opposing the motion. For purposes of this rule, the term "final judgment" shall include any order deciding a post-judgment motion whether or not that order is directly appealable.

(3) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) ...no change.

(g) ...no change.

Note: Source—*R.R.* 4:11 (seventh through tenth sentences); amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996, paragraph (b)(2) amended to be effective.

C. Proposed Amendment to *R.* 1:5-3 — Proof of Service

The Committee recommends amending *R.* 1:5-3 to conform the rule to the terms of the Supreme Court's Order of January 16, 2001, specifically, to require that the proof of service must provide the name and address of each attorney and *pro se* party served, and must identify the party represented by each attorney served.

The proposed amendments to *R.* 1:5-3 follow.

1:5–3. Proof of Service

Proof of service of every paper referred to in R. 1:5–1 may be made (1) by an acknowledgment of service, signed by the attorney for a party or signed and acknowledged by the party, or (2) by an affidavit of the person making service, or (3) by a certification of service appended to the paper to be filed and signed by the attorney for the party making service. If service has been made by mail the affidavit or certification shall state that the mailing was to the last known address of the person served. A proof of service made by affidavit or certification shall state the name and address of each attorney served, identifying the party that attorney represents, and the name and address of any *pro se* party. The proof shall be filed with the court promptly and in any event before action is to be taken on the matter by the court. Where service has been made by registered or certified mail, filing of the return receipt card with the court shall not be required. Failure to make proof of service does not affect the validity of the service, and the court at any time may allow the proof to be amended or supplied unless an injustice would result.

Note: Source — *R.R.* 4:5–2(b), 4:88–10 (fifth sentence); amended July 17, 1975 to be effective September 8, 1975; amended July 29, 1977 to be effective September 6, 1977; amended June 29, 1990 to be effective September 4, 1990; amended _____, 2002 to be effective _____, 2002.

D. Proposed Amendments to *R.* 1:7-1 — Opening and Closing Statement

Rule 1:7-1(b) now reflects that counsel may suggest in closing statements that the jury apply the "time-unit" rule to calculate unliquidated damages, and directs the judge, if such suggestion is made, to instruct the jury that such comments are "argumentative" only and do not constitute evidence. An attorney suggested that the term "argumentative" be changed to "argument." The Committee endorsed the proposed amendment.

The proposed amendments to *R.* 1:7-1 follow.

1:7–1. Opening and Closing Statement

(a) Opening Statement. Before any evidence is offered at trial, the State in a criminal action or the plaintiff in a civil action, unless otherwise provided in the pretrial order, shall make an opening statement. A defendant who chooses to make an opening statement shall do so immediately thereafter.

(b) Closing Statement. After the close of the evidence and except as may be otherwise provided in the pretrial order, the parties may make closing statements in the reverse order of opening statements. In civil cases any party may suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum. In the event such comments are made to a jury, the judge shall instruct the jury that they are [argumentative] argument only and do not constitute evidence.

Note: Source—*R.R.* 3:7–3, 4:44–1, 7:8–4; former rule redesignated as paragraph (a), paragraph (b) adopted and caption amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended _____ to be effective _____.

E. Proposed Amendments to *Rules* 1:7-4 and 4:49-3 — re: Cross-Motions for New Trial or to Alter or Amend a Judgment or Order

An attorney noted that although a number of rules contain provisions for cross-applications (*e.g.*, *Rules* 4:49-1, 2:6-11) a number do not (*e.g.*, *Rules* 1:7-4, 2:11-4). The effect of the failure of a rule explicitly to provide for a cross-application may be the procedural dismissal of such application as being out of time.

The Committee determined that the rules should be amended to provide that if a motion has been timely filed, a germane cross-motion shall relate back to the date of the original motion.

The proposed amendments to *R.* 1:7-4 and the text for new *R.* 4:49-3 follow.

1:7–4. Findings by the Court in Non-jury Trials and on Motions

(a) ...no change

(b) Motion and Cross-Motion for Amendment. On motion made not later than 20 days after service of the final order or judgment upon all parties by the party obtaining it, the court may grant a rehearing or may, on the papers submitted, amend or add to its findings and may amend the final order or judgment accordingly, but the failure of a party to make such motion or to object to the findings shall not preclude that party's right thereafter to question the sufficiency of the evidence to support the findings. The motion to amend the findings, which may be made with a motion for a new trial, shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or on which it has erred. Motions for reconsideration of interlocutory orders shall be determined pursuant to *R.* 4:42–2. A germane cross-motion made pursuant to this rule, if timely filed pursuant to *R.* 1:6-3(b), shall relate back to the date of the original motion.

Note: Source—*R.R.* 3:7–1(c), 4:53–1, 4:53–2, 8:7–2(c); caption and text amended November 1, 1985 to be effective January 2, 1986; caption and text amended November 5, 1986 to be effective January 1, 1987; amended November 7, 1988 to be effective January 2, 1989; caption and text amended July 14, 1992 to be effective September 1, 1992; amended and paragraphs (a) and (b) designated July 10, 1998 to be effective September 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; amended _____, 2002 to be effective _____, 2002.

4:49-3. Cross-Motions for New Trial or to Alter or Amend a Judgment or Order

A germane cross-motion seeking a new trial pursuant to *R.* 4:49-1 or to alter or amend a judgment or order under *R.* 4:49-2, if timely filed pursuant to *R.* 1:6-3(b), shall relate back to the date of the original motion.

Note: Adopted _____, 2002, to be effective _____, 2002.

F. Proposed Amendments to *R.* 1:8-8 — Materials Submitted to the Jury; Note-taking

In the 1996-1998 term, the Committee proposed that a pilot project be authorized, involving a small number of civil trial judges willing to allow jurors to present written questions for the judge to ask of witnesses during trial. The Court authorized the Committee to develop such a proposal for its review.

The Jury Subcommittee, chaired by the Hon. Barbara Wecker, developed the pilot proposal. The Court authorized its implementation, and the pilot ran from January 1 through June 30, 2000, involving 11 civil judges.

Early in the 2000-2002 term, Judge Wecker reported to the Committee that the evaluation indicated that jurors liked having the opportunity to ask questions of witnesses; the 11 judges who participated in the pilot reacted favorably; and attorneys split 60-40 in their reactions, with plaintiff's attorneys being more supportive of the pilot than defense attorneys. A couple of attorneys and one judge on the Committee participated in the pilot, and spoke in favor of instituting the procedure statewide, as allowing jurors the opportunity to ask questions of witnesses seems to result in jurors paying closer attention, helps clarify issues, and provides the trial attorneys with insights into how their case is perceived.

The subcommittee recommended that the Committee propose a rule amendment that would allow the pilot procedures to be used in any civil trial, at the judge's discretion. The Committee voted overwhelmingly in support of this recommendation.

In response to the report of the Jury Subcommittee, an amendment to *R.* 1:8-8 was drafted which would permit each judge presiding over a civil trial the option of employing the juror question procedures used in the pilot. The Committee agreed that juror questions should be limited to those posed "to clarify the testimony of a witness."

Subsequently, the Committee agreed that the preliminary and final instructions given to jurors in the juror-question pilot should be used if the Court adopts the proposed amendments to *R.* 1:8-8, and recommended that these instructions be referenced in an official comment to the rule. The Committee also referred the pilot instructions to the Model Civil Jury Charge Committee for review. See also Section IV. E., *infra*.

The report of the Jury Subcommittee on the Pilot Project Allowing Juror Questions is included as Appendix A to this report.

The proposed amendments to *R.* 1:8-8 follow.

1:8-8. Materials to be Submitted to the Jury; Note-taking; Juror Questions

(a) ...no change

(b) ...no change

(c) Juror Questions. Prior to the commencement of the *voir dire* of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that questions by the jurors will be allowed, subject to the rules of evidence and the court's discretion, for the purpose of clarifying the testimony of a witness. The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination in order to respond to the jurors' questions and the witness's answers.

Note: Source—*R.R.* 4:52-2; caption and text amended July 15, 1982 to be effective September 13, 1982; amended and paragraphs (a) and (b) designated July 10, 1998 to be

effective September 1, 1998; new paragraph (c) added to be effective _____.

G. Proposed Amendments to *R.* 1:13-3 — Approval and Filing of Surety Bond; Judgment Against Principal and Surety

In August 2000, Capital Bonding Corporation challenged, in federal district court, the constitutionality of recent amendments to *R.* 1:13-3(e). Those amendments implemented a statewide bail preclusion policy, *i.e.*, removal of the names of licensed insurance producers and limited insurance representatives from the bail registry — a list of those authorized to write bail — upon a failure to satisfy a judgment or pay a forfeiture, or file a motion to vacate a forfeiture.

The Bail Forfeiture Judges and the Criminal Practice Committee determined that the procedure set forth in the rule did not provide for adequate notice of preclusion. Accordingly, on November 1, 2000, the Supreme Court issued an Order relaxing and supplementing *R.* 1:13-3(e) to remedy the notice problem.

Subsequently, the Criminal Practice and Municipal Practice Committees drafted proposed amendments to *R.* 1:13-3(e), to incorporate the terms of the Court's relaxation order. The Civil Practice Committee has reviewed and endorses those amendments, noting that concomitant changes to Appendix XXI of the Rules of Court are also required.

The proposed amendments to *R.* 1:13-3 and to Appendix XXI follow.

1:13–3. Approval and Filing of Surety Bond; Judgment Against Principal and Surety

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) Registry of Licensed Insurance Producers and Limited Insurance Representatives Authorized to Write Bail. Surety bonds for purposes of bail may be accepted only from those licensed insurance producers and limited insurance representatives who are registered by the [insurance] corporate surety company for which they are authorized to write bail with the Clerk of the Superior Court as required by *N.J.S.A.* 17:22A-16. Such registration shall be effected by completing and submitting to the Clerk of the Superior Court an ?Insurance Producer/Limited Representative Registration Form? in the form prescribed by Appendix XXI to these rules. The [insurance] corporate surety company shall provide written notice to the Clerk of the Superior Court when any licensed insurance producer or limited insurance representative authorized to write bail is terminated.

(e) Removal from Bail Registry. Any licensed insurance producer or limited insurance representative shall have his or her name removed from [an insurance] a corporate surety company's listing in the Bail Registry upon any of the following occurrences: (1) notice from [an insurance] a corporate surety company of the individual's termination; (2) notice from the Insurance Commissioner of the suspension or revocation of any individual's license or registration privileges; and (3) revocation or suspension of [an

insurance] a corporate surety company's authority to do business in this State or of its certificate of authority to write surety instruments. Further, in the event any [insurance] corporate surety company has failed to satisfy a judgment entered pursuant to *R.* 3:26-6(c) or *R.* 7:4-5(c), [or to pay a forfeiture or to file a motion to vacate the forfeiture within forty-five (45) days of the date of the notice sent pursuant to *R.* 3:26-6,] the Clerk of the Superior Court shall serve notice, by certified mail, return receipt requested, on the corporate surety company whose name appears on the judgment, at the address of the corporate surety company recorded in the Bail Registry. The notice shall provide that failure to satisfy a judgment within fifteen days of the date of the notice will result in the removal of the names of all of [its] the corporate surety company's licensed insurance producers and limited insurance representatives [shall be removed] from the Bail Registry until such time as the judgment [or forfeiture] has been satisfied. In that event, the individual licensed insurance producer or limited insurance representative who acted as bail bondsman shall also have his or her name removed from all listings in the Bail Registry until such time as the judgment [or forfeiture] has been satisfied. The Clerk of the Superior Court shall then remove from the Bail Registry the names of any licensed insurance producers and limited insurance representatives authorized to write bail for the corporate surety company. Bail bonds from the corporate surety company, licensed insurance producers and limited insurance representatives shall not be accepted during the period that they are removed from the Bail Registry.

Note: Source—*R.R.* 1:4–8(b), 1:4–9, 3:9–7(c) (second, third and fourth sentences), 4:72–2, 4:118–6(a)(b). Paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; new paragraphs (d) and (e) added July 5, 2000 to be effective September 5, 2000; paragraphs (d) and (e) amended to be effective .

APPENDIX XXI

INSURANCE PRODUCER/LIMITED INSURANCE REPRESENTATIVE REGISTRATION FORM

INSURANCE/SURETY COMPANY:

Name: _____ **N.A.I.C. #:** _____

Address: _____
Street City State Zip Code

Telephone: _____ _____
Area Code Number

AUTHORIZED REPRESENTATIVE:

Name: _____

N.J. Department of Banking/
Insurance-License/Registration #: _____ **Exp. Date:** _____

Office Address: _____
Street City State Zip Code

Telephone: _____ _____
Area Code Number

Check ✓ one: ☐ **Insurance Producer** ☐ **Limited Insurance Representative**

CERTIFICATION BY INSURANCE COMPANY:

I certify that the above-listed representative is authorized by the named corporate surety company to write bail bonds on behalf of said corporate surety company in New Jersey and is either licensed or registered to represent the corporate surety company with the New Jersey Department of Banking and Insurance.

_____ _____
Signature Title

_____ **Dated:** _____
Print Name

Mail or fax completed registration form to:

Office of Superior Court Clerk
Insurance Registration Program
P.O. Box 971
Trenton, NJ 08625
Fax: (609) 292-6564

(THIS FORM MAY BE DUPLICATED.)

rev:12/04/01

H. Proposed Amendments to *R.* 1:21-1 — Who May Practice; Appearance in Court

At the request of the Department of Labor, the Committee considered and approved amending *R.* 1:21-1(f) to permit the appearance of non-lawyer representatives in contested employment hearings, provided that no fee is paid for such representation. Such a rule amendment would codify current and long-standing practice.

The proposed amendments to *R.* 1:21-1 follow.

1:21–1. Who May Practice; Appearance in Court

(a) ...no change

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) Appearances Before Office of Administrative Law and Administrative Agencies. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law or an administrative agency may be permitted, on application, in any of the following circumstances:

(1) ...no change.

(2) ...no change.

(3) ...no change.

(4) ...no change.

(5) ...no change.

(6) ...no change.

(7) ...no change.

(8) ...no change.

(9) ...no change.

(10) ...no change.

(11) to represent a claimant before the Appeals Tribunals or Boards of Review of the Department of Labor.

No representation or assistance may be undertaken pursuant to subsection (f) by any disbarred or suspended attorney nor by any person who receives any fee for such representation.

Note: Source—*R.R.* 1:12–4(a) (b) (c) (d) (e) (f). Paragraph (c) amended by order of December 16, 1969 effective immediately; paragraphs (a) and (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 24, 1978 to be effective September 11, 1978; paragraph (a) amended September 21, 1981 to be effective immediately; paragraph (c) amended and paragraph (d) adopted July 15, 1982 to be effective September 13, 1982; paragraph (a) amended August 13, 1982 to be effective immediately; paragraph (e) adopted July 22, 1983 to be effective September 12, 1983; paragraph (c) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended and paragraph (e)(8) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e), and (e)(7) amended, and paragraph (e)(9) added July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (e) amended June 28, 1996 to be effective September 1, 1996; paragraph (c) amended November 18, 1996 to be effective January 1, 1997; paragraph (c) amended January 5, 1998 to be effective February 1, 1998; paragraph (a) amended, former paragraphs (d) and (e) redesignated as paragraphs (e) and (f), and new paragraph (d) adopted July 10, 1998 to be effective September 1, 1998; closing paragraph amended July 5, 2000 to be effective September 5, 2000; new section (f)(11) added to be effective _____.

I. Proposed Amendment to *R.* 1:21-7 — Contingent Fees

In the 1998-2000 term, the Committee had asked the Supreme Court for its view on the Committee's position that the limitations of the contingent fee rule do not apply to employment or discrimination cases. The Court agreed with the Committee's position and indicated that an official comment to the rule might be promulgated to memorialize this position. In lieu of the publication of an official comment, the Committee proposes that, for the sake of ease and clarity, *R.* 1:21-7(c) simply be amended to exclude employment and LAD cases from its provisions.

The Committee also recommends changing the reference in *R.* 1:21-1(c)(6) from "incompetent" to "mentally incapacitated." See also Section I. JJ., *infra*.

See Section II.F. of this report for discussion of other proposed amendments to this rule, which the Committee does not recommend.

The proposed amendments to *R.* 1:21-7 follow.

1:21–7. Contingent Fees

(a) ...no change.

(b) ...no change.

(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims and claims among family members that are subject to Part V of these Rules but excluding discrimination and employment cases, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

(1) 33 1/3% on the first $500,000 recovered;

(2) 30% on the next $500,000 recovered;

(3) 25% on the next $500,000 recovered;

(4) 20% on the next $500,000 recovered; and

(5) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof; and

(6) where the amount recovered is for the benefit of a client who was a minor or [incompetent] mentally incapacitated when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.

(d) ...no change.

(e) ...no change.

(f) ...no change.

(g) ...no change.

(h) ...no change.

(i) ...no change.

Note: Source—*R.* 1:21–6(f), as adopted July 7, 1971 to be effective September 13, 1971 and deleted December 21, 1971 to be effective January 31, 1972. Adopted December 21, 1971 to be effective January 31, 1972. Amended June 29, 1973 to be effective September 10, 1973. Paragraphs (c) and (e) amended October 13, 1976, effective as to contingent fee arrangements entered into on November 1, 1976 and thereafter. Closing statements on all contingent fee arrangements filed as previously required between January 31, 1972 and January 31, 1973 shall be filed with the Administrative Office of the Courts whenever the case is closed; paragraph (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 24, 1978 to be effective September 11, 1978; paragraph (c) amended and new paragraphs (h) and (I) adopted January 16, 1984, to be effective immediately; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (e) amended June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c)(5) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (c) amended January 21, 1999 to be effective April 5, 1999; paragraphs (g) and (h) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended to become effective .

J. Proposed Amendments to *Rules* 1:36-3 and 2:6-1 — re: Unpublished Opinions

The Chair of the Civil Practice Committee suggested that these rules be amended to make it clear that counsel may not cite an unpublished opinion to the court unless all parties **and the court** have been served with a copy of the opinion.

The Committee agreed that the rules should be amended to require that the court be served with a copy of any unpublished opinion cited by counsel.

See Section I. L. of this report for a discussion of additional proposed amendments to *R.* 2:6-1, which the Committee recommends.

See Section II. G. of this report for a discussion of proposed amendments to *R.* 1:36-3, which the Committee does not recommend.

The proposed amendments to *Rules* 1:36-3 and 2:6-1 follow.

1:36–3. Unpublished Opinions

No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.

Note: Adopted July 16, 1981 to be effective September 14, 1981; caption and rule amended July 13, 1994 to be effective September 1, 1994; amended to be effective .

2:6–1. Preparation of Appellant's Appendix; Joint Appendix; Contents

(a) Contents of Appendix.

(1) Required Contents. The appendix prepared by the appellant or jointly by the appellant and the respondent shall contain (A) in civil actions, the complete pretrial order, if any, and the pleadings; (B) in criminal, quasi-criminal or juvenile delinquency actions, the indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below; (C) the judgment, order or determination appealed from or sought to be reviewed or enforced, including the jury verdict sheet, if any; (D) the trial judge's charge to the jury, if at issue, and any opinions or statement of findings and conclusions; (E) the statement of proceedings in lieu of record made pursuant to R. 2:5–3(f); (F) the notice or notices of appeal; (G) the transcript delivery certification prescribed by R. 2:5–3(e); [and] (H) any unpublished opinions cited pursuant to *R.* 1:36-3; and (I) such other parts of the record, excluding the stenographic transcript, as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised. If the appeal is from a summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix, except that briefs in support of and opposition to the motion shall be included only as permitted by subparagraph (2) of this rule.

(2) ...no change.

(b) ...no change.

(c) Binding; Table of Contents. The appendix may be bound with the brief or separately, into volumes containing no more than 200 sheets each. If bound with the brief, it shall follow the brief, but there shall be a single table of contents of the brief and appendix. If bound separately it shall be prefaced with a table of contents. The table of contents shall indicate the initial page of each document, exhibit or other paper included, and the pages of the stenographic record at which each exhibit was marked for identification and was offered into evidence. Attachments to a document by way of affidavits, exhibits or otherwise shall each be separately identified in the table of contents and the initial page of each such attachment noted therein. If there are multiple volumes of the appendix, each volume shall contain a full table of contents and shall specify on its cover the appendix pages included therein.

(d) ...no change.

Note: Source—*R.R.* 1:7–1(f), 1:7–2 (first six sentences), 1:7–3. Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a), (b) and (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1) and (c) amended _____ to be effective _____.

K. Proposed Amendment to *Rules* 1:40-11 and 1:40-12 — Re: Mediators

The Supreme Court Committee on Complementary Dispute Resolution, chaired by Justice Stein, recommended amendments to *Rule* 1:40-11, to provide that the Assignment Judge's designee may approve the appointment of a mediator not on the court's roster (*e.g.*, a retired judge or a mediator who does not provide the first three hours free), and to *Rule* 1:40-12, to require additional training of mediators, thereby bringing New Jersey closer to conformance with national standards.

The Committee supports the recommended amendments of the Supreme Court Committee on Complementary Dispute Resolution.

The proposed amendments to *Rules* 1:40-11 and 1:40-12 follow.

1:40–11. Non-Court Dispute Resolution

With the approval of the Assignment Judge or his or her designee, the court, while retaining jurisdiction, may refer a matter to a non-court administered dispute resolution [program] process not subject to these rules or guidelines. The Assignment Judge or his or her designee may approve such referral upon the finding that it will not prejudice the interests of the parties.

Note: Adopted July 14, 1992 as Rule 1:40-9 to be effective September 1, 1992; redesignated as Rule 1:40-11 July 5, 2000 to be effective September 5, 2000; amended to be effective .

1:40–12. Qualification and Training of Mediators and Arbitrators

(a) Mediator Qualifications.

(1) ...no change.

(2) ...no change.

(3) Civil, General Equity, and Probate Action Mediators. Mediator applicants for civil, general equity, and probate actions shall have at least five years of professional experience in the field of their expertise, as well as either an advanced degree or an undergraduate degree, coupled in both cases with mediation experience. For purposes of this rule, an advanced degree means a juris doctor or equivalent; an advanced degree in business, finance, or accounting, an advanced degree in the field of expertise in which the applicant will practice mediation, for example, engineering, architecture, or mental health; or state licensure in the field of expertise, for example, certified public accountant, architect, or engineer. For purposes of this rule, mediation experience which, together with an advanced degree, will qualify an applicant means evidence of successful mediation of a minimum of two cases within the last year, provided however that mediation experience is waived if mediation training was completed within the last five years. For purposes of this rule, mediation experience which, together with an undergraduate degree, will qualify an applicant means evidence of successful mediation of a minimum of ten cases involving subject matter otherwise cognizable in the Superior Court within the last five years.

(4) ...no change.

(5) ...no change.

(b) Mediator Training Requirements.

(1) General Provisions. Unless waived pursuant to subparagraph (2), all persons serving as mediators shall have completed the basic dispute resolution training course as prescribed by these rules and approved by the Administrative Office of the Courts as follows: mediators on the civil, general equity, and probate roster of the Superior Court, volunteer mediators in the Special Civil Part, and Municipal Court mediators shall have completed 18 classroom hours of basic mediation skills complying with the requirements of subparagraph (4) of this rule. Mediators on the civil, general equity and probate roster of the Superior Court shall have completed 35 classroom hours of basic mediation skills complying with the requirements of subparagraph (4) of this rule and at least five hours spent co-mediating with an experienced mediator on the roster in at least two cases in the Superior Court; Family Part mediators shall have completed a 40-hour training program complying with the requirements of subparagraph (5) of this rule; and judicial law clerks shall have successfully completed 12 classroom hours of basic mediation skills complying with the requirements of subparagraph (6) of this rule.

(2) ...no change.

(3) ...no change.

(4) Mediation Course Content — Basic Skills. The 18-hour classroom course in basic mediation skills shall, by lectures, demonstrations, exercises and role plays, teach the

skills necessary for mediation practice, including but not limited to conflict management, communication and negotiation skills, the mediation process, and addressing problems encountered in mediation. The 35-hour classroom course in basic mediation skills for civil, general equity and probate cases shall have additional exercises and role plays.

(5) ...no change.

(6) ...no change.

(7) ...no change.

(c) ...no change.

(d) ...no change.

Note: Adopted July 14, 1992 as Rule 1:40-10 to be effective September 1, 1992; caption amended, former text redesignated as paragraphs (a) and (b), paragraphs (a)3.1 and (b)4.1 amended June 28, 1996 to be effective September 1, 1996; redesignated as Rule 1:40-12, caption amended and first sentence deleted, paragraph (a)1.1 amended and redesignated as paragraph (a)(1), paragraph (a)2.1 amended and redesignated as paragraph (a)(2), paragraph (a)2.2 amended and redesignated as paragraph (b)(5), new paragraphs (a)(3) and (a)(4) adopted, paragraph (a)3.1 redesignated as paragraph (a)(5), paragraph (a)3.2 amended and incorporated in paragraph (b)(1), paragraph (a)4.1 amended and redesignated as paragraph (b)(6), paragraph (b)1.1 amended and redesignated as paragraph (b)(1), paragraphs (b)2.1 and (b)3.1 amended and redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)4.1 redesignated as paragraph (b)(4) with caption amended, paragraph (b)5.1 amended and redesignated as paragraph (b)(7) with caption amended, new section (c) adopted, and paragraph (b)5.1(d) amended and redesignated as new section (d) with caption amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(3); (b)(1); and (b)(4) amended _____ to be effective _____.

L. Proposed Appellate Rule Amendments

The Civil Practice Committee recommends amendments to the following appellate rules:

R. 2:6-1 — The Committee supports the proposal of the Appellate Division Rules Committee to amend *R.*2:6-1(c) to require, where there are multiple volumes of transcript, that the cover of each should include a specification of the pages included therein and that a full table of contents be included with each appendix volume. See also Section I. J., *supra*.

R. 2:6-2 — The Committee supports the proposal of the Appellate Division Rules Committee to amend *R.*2:6-2 to incorporate the terms of the Supreme Court's December 15, 2000 relaxation Order, permitting appellate briefs to contain a short preliminary statement. The Committee would limit the preliminary statement to three pages.

R. 2:6-8 — The Appellate Division Rules Committee proposed amending *R.* 2:6-8 to require that multiple volumes of transcript be numbered sequentially by chronology. The Committee endorses this proposal.

R. 2:8-1 — The Appellate Division Rules Committee proposed amending *R.* 2:8-1 to require that certain motions be decided by a panel of at least two judges. The Committee endorses this proposal.

The proposed amendments to *Rules* 2:6-1, 2:6-2, 2:6-8, and 2:8-1 follow.

2:6–1. Preparation of Appellant's Appendix; Joint Appendix; Contents

(a) Contents of Appendix.

(1) Required Contents. The appendix prepared by the appellant or jointly by the appellant and the respondent shall contain (A) in civil actions, the complete pretrial order, if any, and the pleadings; (B) in criminal, quasi-criminal or juvenile delinquency actions, the indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below; (C) the judgment, order or determination appealed from or sought to be reviewed or enforced, including the jury verdict sheet, if any; (D) the trial judge's charge to the jury, if at issue, and any opinions or statement of findings and conclusions; (E) the statement of proceedings in lieu of record made pursuant to R. 2:5–3(f); (F) the notice or notices of appeal; (G) the transcript delivery certification prescribed by R. 2:5–3(e); [and] (H) any unpublished opinions cited pursuant to *R.* 1:36-3; and (I) such other parts of the record, excluding the stenographic transcript, as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised. If the appeal is from a summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix, except that briefs in support of and opposition to the motion shall be included only as permitted by subparagraph (2) of this rule.

(2) ...no change.

(b) ...no change.

(c) Binding; Table of Contents. The appendix may be bound with the brief or separately, into volumes containing no more than 200 sheets each. If bound with the brief, it shall follow the brief, but there shall be a single table of contents of the brief and appendix. If bound separately it shall be prefaced with a table of contents. The table of contents shall indicate the initial page of each document, exhibit or other paper included, and the pages of the stenographic record at which each exhibit was marked for identification and was offered into evidence. Attachments to a document by way of affidavits, exhibits or otherwise shall each be separately identified in the table of contents and the initial page of each such attachment noted therein. If there are multiple volumes of the appendix, each volume shall contain a full table of contents and shall specify on its cover the appendix pages included therein.

(d) ...no change.

Note: Source—*R.R.* 1:7–1(f), 1:7–2 (first six sentences), 1:7–3. Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a), (b) and (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1) and (c) amended to be effective .

2:6–2. Contents of Appellant's Brief

(a) Formal Brief. Except as otherwise provided by R. 2:6–4(c)(1) (statement in lieu of brief), by R. 2:9–11 (sentencing appeals), and by paragraph (b) of this rule, the brief of the appellant shall contain the following material, under distinctive titles, arranged in the following order:

(1) ...no change.

(2) ...no change.

(3) ...no change.

(4) ...no change.

(5) ...no change.

(6) In addition to the foregoing, each brief may include an optional preliminary statement for the purpose of providing a brief overview of the case. The preliminary statement shall not exceed three pages and may not include footnotes or, to the extent practicable, citations.

(b) ...no change.

(c) ...no change.

(d) ...no change.

Note: Source—*R.R.* 1:7–1(a) (b) (d) (e) (g); amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended, former paragraphs (a) (b) (c) and (e) redesignated subparagraphs (1), (2) (3) and (5), subparagraph (4) and paragraphs (b) and (c)

adopted July 24, 1978 to be effective September 11, 1978; paragraph (b) amended January 10, 1979 to be effective immediately; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(5) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a) and (b) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; new paragraph (d) added July 14, 1992 to be effective September 1, 1992; paragraph (a)(5) amended July 13, 1994 to be effective September 1, 1994; paragraph (6) added to be effective .

2:6–8. References to Briefs; Appendices; Transcripts

References to a brief or appendix shall be made to the appropriate pages, and references to the stenographic transcript shall be made to the appropriate pages and lines thereof, by the following abbreviations:

"Pb8" for plaintiff's brief, page 8;

"Db8" for defendant's brief, page 8;

"Pa8" for plaintiff's appendix, page 8;

"Da12" for defendant's appendix, page 12;

"Ja15" for joint appendix, page 15;

"Prb8" for plaintiff's reply brief, page 8;

"Pra7" for plaintiff's reply appendix, page 7;

"T8–3" for transcript, page 8, line 3.

If there is more than one plaintiff or defendant, the appropriate party's name or initial or other identifying designation should precede the abbreviation. If there are multiple volumes of transcript, they shall be numbered sequentially by chronology, *i.e.*, 1T, 2T, etc., irrespective of the nature of the proceeding.

Note: Source—*R.R.* 1:7–8; amended July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

2:8–1. Motions

(a) ...no change.

(b) ...no change.

(c) Disposition. Unless the court otherwise directs, all motions in the Appellate Division shall be decided by a single judge except that motions for bail, stay of any order or judgment, summary disposition, and leave to appeal shall be decided by [the full part or by the panel thereof to whom the appeal may have been assigned for disposition. The foregoing notwithstanding] a panel of at least two judges. Insofar as practicable, motions for reconsideration and motions for counsel fees for work performed in the Appellate Division shall be decided by the judges who decided the original matter.

(d) ...no change.

(e) ...no change.

Note: Source—*R.R.* 1:7–10(b), 1:11–1, 1:11–2(a) (b), 1:11–3, 2:11–1, 2:11–2, 2:11–3, 4:61–1(c). Paragraph (a) amended, paragraph (c) adopted and former paragraph (c) redesignated (d) July 24, 1978 to be effective September 11, 1978; paragraph (b) amended and paragraph (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) and (d) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended to be effective .

M. Proposed Amendments to *R.* 4:4-1 — Summons: Issuance

Rule 4:4-1 provides for dismissal if a summons is not issued within ten days after the filing of the complaint. The Conference of Civil Presiding Judges recommended that the rule be amended to require the summons to be issued within 15 days from the date of the Track Assignment Notice (TAN). Pursuant to *R.* 4:5A-2(a), the court must mail the TAN to the plaintiff within ten days after the filing of the complaint, and the plaintiff must annex a copy of the TAN to process served on each defendant. The Committee supports this recommendation.

The proposed amendments to *R.* 4:4-1 follow.

4:4–1. Summons; Issuance

The plaintiff, plaintiff's attorney or the clerk of the court may issue the summons. If a summons is not issued within [10 days after the filing of the complaint] 15 days from the date of the Track Assignment Notice the action may be dismissed in accordance with *R.* 4:37–2(a). Separate or additional summonses may issue against any defendants.

Note: Source—*R.R.* 4:4–1; amended July 13, 1994 to be effective September 1, 1994; amended to be effective .

N. Proposed Amendments to *Rules* 4:4-3 and 4:42-8 — re: Taxed Costs

By Supreme Court Order of January 16, 2001, *R.* 4:42-8 was relaxed to permit taxed costs to include the fees paid to a private person serving process, in an amount not exceeding allowable sheriff's fees. The Committee proposes amending *Rules* 4:4-3 and 4:42-8 to incorporate the terms of the relaxation order.

The proposed amendments to *Rules* and 4:42-8 4:4-3 follow.

4:4–3. By Whom Served; Copies

(a) ...no change

(b) ...no change

(c) Private Service; Costs

When service of process pursuant to this rule has been made by any person other than the sheriff, the allowance of taxed costs pursuant to R. 4:42-8 shall include a cost of service not exceeding the fee and mileage expenses allowable by law to the sheriff for that service.

Note: Source—R.R. 4:4–3, 5:5–1(c), 5:2–2; amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; captions and text of paragraphs (a) and (b) deleted and replaced with new captions and text July 5, 2000 to be effective September 5, 2000; amended , 2002 to be effective , 2002.

4:42–8. Costs

(a) ...no change.

(b) ...no change.

(c) Proof of Costs. A party entitled to taxed costs shall file with the clerk of the court an affidavit stating that the disbursements taxable by law and therein set forth have been necessarily incurred and are reasonable in amount, and if incurred for the attendance of witnesses, shall state the number of days of actual attendance and the distance traveled, if mileage is charged. Such costs may include fees paid to a private person serving process pursuant to *R.* 4:4-3, but not in an amount exceeding allowable sheriff's fees for that service.

(d) ...no change.

Note: Source—R.R. 4:55–6(a)(b)(c)(d)(e), 7:9–6 (last sentence); paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended _____ to be effective ____.

O. Proposed Amendments to *R.* 4:4-4 — Summons; Personal Service; In Personam Jurisdiction

An attorney suggested that *R.* 4:4-4(c) be amended to clarify that no default may be entered against a defendant served by optional mailed service. The Committee agreed that such a clarification would be helpful.

See Sections II. J. and K. of this report, for a discussion of other proposed amendments to this rule, which the Committee does not recommend.

The Committee also recommends changing the reference in *R.* 4:4-4(a)(3) from "incompetent" to "mentally incapacitated." See also Section I., JJ., *infra*.

The proposed amendments to *R.* 4:4-4 follow.

4:4–4. Summons; Personal Service; In Personam Jurisdiction

Service of summons, writs and complaints shall be made as follows:

(a) ...no change.

(1) ...no change.

(2) ...no change.

(3) Upon [an incompetent] a mentally incapacitated person, by delivering a copy of the summons and complaint personally to the guardian of the [incompetent's] person of the mentally incapacitated individual or to a competent adult member of the household with whom the [incompetent] mentally incapacitated person resides, or if the [incompetent] mentally incapacitated person resides in an institution, to the director or chief executive officer thereof;

(4) ...no change.

(5) ...no change.

(6) ...no change.

(7) ...no change.

(8) ...no change.

(b) ...no change.

(1) ...no change.

(A) ...no change.

(B) ...no change.

(C) mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, and, simultaneously, by ordinary mail to: (i) a competent individual of the age of 14 or over, addressed to the individual's dwelling house or usual place of abode; (ii) a minor under the age of 14 or an [incompetent] a mentally incapacitated person, addressed to the person or persons on whom service is authorized by paragraphs (a)(2) and (a)(3) of this rule; (iii) a corporation, partnership or unincorporated association that is subject to suit under a recognized name, addressed to a registered agent for service, or to its principal place of business, or to its registered office. Mail may be addressed to a post office box in lieu of a street address only as provided by *R.* 1:5–2.

(2) ...no change.

(3) ...no change.

(c) Optional Mailed Service. Where personal service is required to be made pursuant to paragraph (a) of this rule, service, in lieu of personal service, may be made by registered, certified or ordinary mail, provided, however, that such service shall be effective for obtaining in personam jurisdiction only if the defendant answers the complaint or otherwise appears in response thereto, and provided further that default shall not be entered against a defendant who fails to answer or appear in response thereto. This prohibition against entry of default shall not apply to mailed service authorized by any other provision of these rules. If defendant does not answer or appear within 60 days following mailed

service, service shall be made as is otherwise prescribed by this rule, and the time prescribed by *R.* 4:4–1 for issuance of the summons shall then begin to run anew.

Note: Source—*R.R.* 4:4–4. Paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (b) amended July 14, 1972 to be effective September 5, 1972; paragraph (f) amended July 15, 1982 to be effective September 13, 1982; paragraph (e) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a), (f) and (g) amended November 5, 1986 to be effective January 1, 1987; paragraph (i) amended November 2, 1987 to be effective January 1, 1988; paragraph (e) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended July 14, 1992 to be effective September 1, 1992; text deleted and new text substituted July 13, 1994 to be effective September 1, 1994; paragraph (c) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(3), (b)(1)(C), and (c) amended to be effective .

P. Proposed Amendments to *R.* 4:4-7 — re: Proof of Service

An attorney requested that the rules should provide for a uniform return of service form and procedure for filing the proof of service.

Because there is a uniform return of service form utilized by the Superior Court Clerk, the Committee proposes amending *R.* 4:4-7 to require that proof of service be in the form prescribed by the Superior Court Clerk. The Committee further recommends amending *R.* 4:4-7 to require that the proof of service be timely filed either by the person making service or by the party on whose behalf service is made.

The proposed amendments to *R.* 4:4-7 follow.

4:4–7. Return

The person serving the process shall make proof of service thereof on the original process[,] and [in Superior Court actions also] on the copy [, and shall promptly file such process with the court within the time during which the person served must respond thereto]. Proof of service shall be promptly filed with the court within the time during which the person served must respond thereto, either by the person making service or by the party on whose behalf service is made. The proof of service, which shall be in the form prescribed by the Clerk of the Superior Court, shall state the name of the person served and the place, mode and date of service, and a copy thereof shall be forthwith furnished plaintiff's attorney by the person serving process. If service is made upon a member of the household pursuant to R. 4:4–4 that person's name shall be stated in the proof or, if such name cannot be ascertained, the proof shall contain a description of the person upon whom service was made. If service is made by a person other than a sheriff or a court appointee, proof of service shall be by similar affidavit which shall include the facts of the affiant's diligent inquiry regarding defendant's place of abode, business or employment. If service is made by mail, the party making service shall make proof thereof by affidavit which shall also include the facts of the failure to effect personal service and the facts of the affiant's diligent inquiry to determine defendant's place of abode, business or employment. With the proof shall be filed the affidavit or affidavits of inquiry, if any, required by R. 4:4–4 and R. 4:4–5. Where service is made by registered or certified mail and simultaneously by regular mail, the return receipt

card or the unclaimed registered or certified mail shall be filed as part of the proof. Failure to make proof of service does not affect the validity of service.

Note: Source—*R.R.* 4:4–7. Amended July 14, 1972 to be effective September 5, 1972; amended June 29, 1990 to be effective September 4, 1990; amended July 14, 1992 to be effective September 1, 1992; amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; amended , 2002 to be effective , 2002.

Q. Proposed Amendments to *R*. 4:6-1 — Defenses and Objections; When Presented

The Conference of Civil Presiding Judges unanimously recommended that *R.* 4:6-1 be amended to require that a consent order or stipulation extending time to answer be accompanied by the answer when submitted to the court.

The Committee endorses this proposal.

The proposed amendments to *R.* 4:6-1 follow.

4:6–1. When Presented

(a) ...no change.

(b) ...no change.

(c) Time; Extension by Consent. The time for service of a responsive pleading may be enlarged for a period not exceeding 60 days by the written consent of the parties, which shall be filed with the responsive pleading within said 60 day period. Further enlargements shall be allowed only on notice by court order, on good cause shown therefore.

(d) ...no change.

Note: Source—*R.R.* 4:12–1(a)(b)(c)(e), 4:96–2(c); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (c) amended to be effective .

R. Proposed Amendments to *Rules* 4:10-2 and 4:17-4 — re: Discoverability of Experts' Draft Reports

The Subcommittee on the Discoverability of Experts' Draft Reports, chaired by the Hon. Charles J. Walsh, J.S.C., was charged with the task of determining whether experts' drafts reports should be subject to disclosure. The subcommittee determined that a safe harbor from discovery should be created for the preparation of expert reports, including drafts of those reports. Accordingly, the subcommittee recommended that *R.* 4:10-2(d)(1) be amended specifically to protect from disclosure communications between counsel and experts constituting the collaborative process in preparation of the experts report, including drafts, and that *R.* 4:17-4(e) be amended to describe the contents of the expert report.

The Committee endorses the "safe harbor" concept and recommends the rule amendments proposed by the subcommittee.

The report of the Subcommittee on the Discoverability of Experts' Draft Reports is included as Appendix B to this report.

The proposed amendments to *Rules* 4:10-2 and 4:17-4 follow.

4:10–2. Scope of Discovery

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of *R.* 4:10–2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and, whether or not expected to testify, of an expert who has conducted an examination pursuant to *R.* 4:19 [whether or not that person is expected to testify, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to furnish, as provided by *R.* 4:17–4(a), a copy of the report of an expert witness, including a treating physician, and, whether or not that person is expected to testify, of an expert who has conducted an examination pursuant to *R.* 4:19] or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. The

interrogatories may also require, as provided by *R.* 4:17-4(b), the furnishing of a copy of that person's report. Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by *R.* 4:17-4(b), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule.

(2) ...no change.

(3) ...no change.

(e) ...no change.

Note: Source—*R.R.* 4:16–2, 4:23–1, 4:23–9, 5:5–1(f). Amended July 14, 1972 to be effective September 5, 1972 (paragraphs (d)(1) and (2) formerly in *R.* 4:17B1); paragraph (d)(2) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c) and (d)(1) and (3) amended July 13, 1994 to be effective September 1, 1994; paragraph (d)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) adopted July 10, 1998 to be effective September 1, 1998; paragraph (d)(1) amended to be effective _____.

4:17–4. Form, Service and Time of Answers

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) Expert's or Treating Physician's Names and Reports. If an interrogatory requires a copy of the report of an expert witness or [a] treating or examining physician as set forth in *R.* 4:10-2(d)(1), the answering party shall annex to the interrogatory an exact copy of the entire report or reports rendered by the expert or [treating] physician. [or a complete summary of any oral report. The answering party shall further certify to not knowing of the existence of other reports of that expert or treating physician, either written or oral, and if such become later known or available, they shall be served promptly on the propounding party, but in no case later than the time provided by *R.* 4:17–7.] The report shall contain a complete statement of that person's opinions and the basis therefor; the facts and data considered in forming the opinions; any exhibits proposed to be used at trial as a summary or explanation of, or support for, the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. If the answer to an interrogatory requesting the name and report of the party's expert or treating physician indicates that the same will be supplied thereafter, the propounder may, on notice, move for an order of the court fixing a day

certain for the furnishing of that information by the answering party. Such order may further provide that an expert or treating physician whose name or report is not so furnished shall not be permitted to testify at trial. Except as herein provided, the communications between counsel and expert deemed trial preparation materials pursuant to *R.* 4:10-2(d)(1) may not be inquired into.

Note: Source—*R.R.* 4:23–4, 4:23–5, 4:23–6(a)(b)(c)(d). Paragraph (a) amended and paragraph (d) adopted July 14, 1972 to be effective September 5, 1972; paragraph (a) amended September 13, 1976 to be effective September 13, 1976; paragraph (a) amended and paragraph (e) adopted July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended June 29, 1990 to be effective September 4, 1990; paragraphs (a), (b) and (e) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (e) amended to be effective _____.

S. Proposed Amendment to *R.* 4:12-4 — Disqualification for Interest

The Certified Shorthand Reporters Association of New Jersey had recommended amendments to *Rules* 4:12-4 and 4:14-6 to extend the disqualification for interest from just certified court reporters to all persons under contract to or in a financial relationship with one of the parties in the case. The Committee addressed the broader issue of whether or not the language of the regulations governing certified shorthand reporters should be included in *Rules* 4:12-4 and 4:14-6 and thereby made applicable to uncertified reporters as well.

The Committee concluded that the regulations should apply to uncertified and certified reporters equally and recommended that *R.* 4:12-4 be amended to include that language. With that prohibition in place, the Committee concluded that there was no need to amend *R.* 4:14-6.

See Section II., O. of this report for further discussion of proposed amendments to *R.* 4:14-6, which the Committee does not recommend.

The proposed amendments to *R.* 4:12-4 follow.

4:12–4. Disqualification for Interest

No deposition shall be taken before or recorded by a person, whether or not a certified shorthand reporter, who is a relative, employee or attorney of a party or a relative or employee of such attorney or is financially interested in the action. Any regulations of the State Board of Shorthand Reporters respecting disqualification of certified shorthand reporters shall apply to all persons taking or recording a deposition.

Note: Source — *R.R.* 4:18–4. Amended July 17, 1975 to be effective September 8, 1975; amended to be effective .

T. Proposed Amendments to *R.* 4:17-7 — Amendment of Answers

The Discovery Subcommittee, chaired by S. Robert Allcorn, Esq. proposed amending *R.* 4:17-7 to require a party who has amended its answers to interrogatories promptly to furnish, upon request by any other party, a certification of those answers.

The Committee supports this proposed amendment.

The proposed amendments to *R.* 4:17-7 follow.

4:17–7. Amendment of Answers

Except as otherwise provided by R. 4:17–4(e), if a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period, as fixed by the track assignment or subsequent order. Thereafter amendments may be allowed only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. All amendments to answers to interrogatories shall be binding upon the party submitting them, and a certification of the amendments shall be promptly furnished to any other party so requesting.

Note: Source—*R.R.* 4:23–12; amended July 29, 1977 to be effective September 6, 1977; amended September 9, 1982 to be effective September 14, 1982; amended July 22, 1983 to be effective September 12, 1983; amended June 29, 1990 to be effective September 4, 1990; amended July 5, 2000 to be effective September 5, 2000; amended to be effective .

U. Proposed Amendments to *R.* 4:18-1 — Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes; Pre-Litigation Discovery

The Committee proposes two amendments to paragraph (b) of this rule:

- to change from 35 to 50 days after service of the summons and complaint the period within which a defendant may serve a response to a request to produce; and
- to impose a continuing obligation on a party who has responded to a request to produce promptly to provide any additional documents as they become known.

See Section II. M. of this report for a discussion of other proposed amendments to *R.* 4:18-1, which the Committee does not recommend.

The proposed amendments to *R.* 4:18-1 follow.

RULE 4:18. DISCOVERY AND INSPECTION OF DOCUMENTS AND PROPERTY; COPIES OF DOCUMENTS

4:18–1. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes; Pre-litigation Discovery

(a) ...no change.

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A copy of the request shall also be simultaneously served on all other parties to the action. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a written response within 35 days after the service of the request, except that a defendant may serve a response within [35] 50 days after service of the summons and complaint upon that defendant. On motion, the court may allow a shorter or longer time. The written response, without documentation annexed but which shall be made available to all parties on request, shall be served by the party to whom the request was made upon all other parties to the action. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond

with the categories in the request. The party submitting the request may move for an order of dismissal or suppression pursuant to *R.* 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. If a party who has furnished a written response to a request to produce or who has supplied documents in response to a request to produce thereafter obtains additional documents that are responsive to the request, an amended written response and production of such documents, as appropriate, shall be served promptly.

(c) ...no change.

Note: Source—*R.R.* 4:24–1. Former rule deleted and new *R.* 4:18–1 adopted July 14, 1972 to be effective September 5, 1972; rule caption and paragraph (c) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (b) amended to be effective .

V. Proposed Amendments to *R.* 4:21A-1 — Actions Subject to Arbitration; Notice and Scheduling of Arbitration

The question was raised as to what types of cases are subject to mandatory arbitration under *R.* 4:21A-1.

The Committee proposes amendments to *R.* 4:21A-1 to make it clear that only those case types described in sections (1), (2) and (3) of paragraph (a) are subject to mandatory arbitration.

The proposed amendments to *R.* 4:21A-1 follow.

4:21A–1. Actions Subject to Arbitration; Notice and Scheduling of Arbitration

(a) Mandatory Arbitration. Arbitration pursuant to this rule is mandatory for applicable cases on Tracks I, II, and III, as set forth in paragraphs (1), (2), and (3) below, and only as required by the managing judge for cases on Track IV.

(1) Automobile Negligence Actions. All tort actions arising out of the operation, ownership, maintenance or use of an automobile shall be submitted to arbitration in accordance with these rules.

(2) Other Personal Injury Actions. Except for professional malpractice actions, all actions for personal injury not arising out of the operation, ownership, maintenance or use of an automobile shall be submitted to arbitration in accordance with these rules.

(3) Other Non-Personal Injury Actions. All actions on a book account or instrument of obligation, all personal injury protection claims against plaintiff's insurer, and all other contract and commercial actions that have been screened and identified as appropriate for arbitration shall be submitted to arbitration in accordance with these rules.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; caption amended and former paragraph (a) redesignated paragraph (a)(1) and new paragraph (a)(2) adopted, paragraphs (b) and (c)(1) and (2) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a)(1) and (2) and (c)(1) and (2) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a)(2) and (c)(1) amended July 13, 1994 to be effective September 1, 1994; paragraphs (b) and (d) amended July 10, 1998 to be effective September 1, 1998; new text added to paragraph (a), paragraphs (a)(1) and (2) amended, new paragraph (a)(3) adopted, and paragraphs (c) and (d) amended July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (d) adopted October 10, 2000 to be effective immediately; paragraph (a) and caption of *R.* 4:21A amended to be effective .

W. Proposed Amendments to *R.* 4:21A-2 — Qualification, Selection, Assignment and Compensation of Arbitrators

A majority of the Conference of Civil Presiding Judges approved the Supreme Court Arbitration Advisory Committee's recommendation for an amendment to *R.* 4:21A-2(b) to expand the membership of the county arbitrator selection committees to include attorneys with expertise in the additional case types now being arbitrated, *e.g.* products liability, commercial.

The Committee endorses this proposal.

The proposed amendments to *R.* 4:21A-2 follow.

4:21A–2. Qualification, Selection, Assignment and Compensation of Arbitrators

(a) ...no change.

(b) Appointment From Roster. If the parties fail to stipulate to the arbitrators pursuant to paragraph (a) of this rule, the arbitrator shall be designated by the civil division manager from the roster of arbitrators maintained by the Assignment Judge on recommendation of the arbitrator selection committee of the county bar association. Inclusion on the roster shall be limited to retired judges of any court of this State who are not on recall and attorneys admitted to practice in this State having at least 7 years of experience in personal injury litigation. The arbitrator selection committee shall be appointed by the county bar association and shall consist of [two attorneys regularly representing plaintiffs in personal injury litigation, two attorneys regularly representing defendants in personal injury litigation, and one member of the bar who does not regularly represent either] plaintiffs' and defense attorneys experienced in the areas of law subject to mandatory arbitration pursuant to *R.* 4:21A-1(a). The members of the arbitrator selection committee shall be eligible for inclusion in the roster of arbitrators. The Assignment Judge shall file the roster with the Administrative Director of the Courts. A motion to disqualify a designated arbitrator shall be made to the Assignment Judge on the date of the hearing.

(c) ...no change.

(d) ...no change.

Note: Paragraph (b) amended to be effective .

X. Proposed Amendments to *R.* 4:24-1 — Time for Completion of Discovery

In accordance with the recommendation of the Conference of Civil Presiding Judges to refine certain civil best practices procedures, the Supreme Court issued an Order on July 2, 2001 relaxing and supplementing *R.* 4:24-1(c) to permit of an informal application to the court either by telephone or in writing to extend discovery as an alternative to the requirement of a written and filed consent. The Committee recommends amending *R.* 4:24-1(c) to conform the rule to the terms of the Supreme Court's Order.

The proposed amendments to *R.* 4:24-1 follow.

4:24–1. Time for Completion of Discovery

(a) ...no change.

(b) ...no change.

(c) Extensions of Time. [The parties may by written and filed consent extend the time for discovery for an additional 60 days.] The parties may consent to extend the time for discovery for an additional 60 days. Such extension may be obtained by signed stipulation filed with the court or by application to the Civil Division Manager or team leader, by telephone or by letter copied to all parties, representing that all parties have consented to the extension. Any such consensual extension of discovery must be sought prior to the expiration of the discovery period, and any telephone application for extension must thereafter be confirmed in writing to all parties by the party seeking the extension. If the parties do not agree or a longer extension is sought, a motion for relief shall be filed with the Civil Presiding Judge or designee in Track I, II, and III cases and with the designated managing judge in Track IV cases, and made returnable prior to the conclusion of the applicable discovery period. The court may, for good cause shown, enter an order extending discovery for a stated period, and specifying the date by which discovery shall be completed. The extension order shall also describe the discovery to be engaged in and such other terms and conditions as may be appropriate. Absent exceptional circumstances, no extension of the discovery period may be permitted after an arbitration or trial date is fixed.

(d) ...no change.

Note: Source—*R.R.* 4:28(a)(d); amended July 13, 1994 to be effective September 1, 1994; amended January 21, 1999 to be effective April 5, 1999; caption amended, text amended and designated as paragraph (a), new paragraphs (b), (c), and (d) adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (d) adopted February 26, 2001 to be effective immediately; paragraph (c) amended to be effective _____.

Y. Proposed Amendments to *R.* 4:25-7(b) and Appendix XXIII

In accordance with the recommendation of the Conference of Civil Presiding Judges to refine certain civil best practices procedures, the Supreme Court issued an Order on July 2, 2001 relaxing and supplementing *R.* 4:25-7(b) and Appendix XXIII to permit counsel, upon consent of all parties, to waive the required pretrial exchange of information and materials, provided such information and materials are furnished to the court on the date of trial. The Committee recommends amending *R.* 4:25-7(b) and Appendix XXIII in conformance with the Supreme Court's Order.

The proposed amendments to *R.* 4:25-7 and to Appendix XXIII follow.

4:25–7. Attorney Conferences

(a) ...no change.

(b) Exchange of Information. Except as otherwise provided by paragraph (d) of this rule, [I]in cases that have not been pretried, attorneys shall confer and, seven days prior to the initial trial date, exchange the pretrial information as prescribed by Appendix XXIII to these rules. At trial and prior to opening statements, the parties shall submit to the court the following in writing: (1) copies of any Pretrial Information Exchange materials that have been exchanged pursuant to this rule, and any objections made thereto; and (2) stipulations reached on contested procedural, evidentiary, and substantive issues. In addition, in jury trials, the parties shall also exchange and submit (1) any proposed voir dire questions, (2) a list of proposed jury instructions pursuant to *R.* 1:8-7, with specific reference either to the Model Civil Jury Charges, if applicable, or to applicable legal authority, and (3) a proposed jury verdict form that includes all possible verdicts the jury may return. Failure to exchange and submit all the information required by this rule may result in sanctions as determined by the trial judge.

(c) ...no change.

(d) Waiver of Exchange. The parties may, in writing, waive the requirement of the exchange of information as set forth in paragraph (b) of this rule, but such waiver shall not affect the obligation to provide the information required by paragraph (b) to the court at the commencement of trial.

Note: Source of paragraph (a)—*R.* 4:25–3(a). New rule adopted July 13, 1994 to be effective September 1, 1994; caption amended, paragraph (b) amended, and new paragraph (c) adopted July 5, 2000 to be effective September 5, 2000; paragraph (b) amended and new paragraph (d) adopted _____ to be effective _____.

APPENDIX XXIII

Pretrial Information Exchange (*R.* 4:25-7(b))

In cases that have not been pretried, attorneys shall confer and exchange the following information seven days prior to the initial trial date, unless such exchange has been waived by written consent of the parties pursuant to *R.* 4:25-7(d):

1. A list of all witnesses (including addresses) to be called in the party's case in chief.

2. A list of all exhibits to be offered in the party's case in chief. All such exhibits shall be premarked for identification and shall be described briefly. Each party shall confer in advance of trial to determine if any such exhibits can be admitted into evidence by agreement or without objection.

3. A list of any proposed deposition or interrogatory reading(s) by page and line number or by question number.

4. Any *in limine* or trial motions intended to be made at the commencement of trial, with supporting memoranda. Such motions shall not go on the regular motion calendar.

   Any objections to the proposed admission into evidence of any exhibit or to any reading by any other party, and any response to an *in limine* or trial motion shall be served on all parties not later than 2 days prior to trial.

5. A listing of all anticipated problems with regard to the introduction of evidence in each party's case in chief, especially, but without limitation, as to any hearsay problems, and legal argument as to all such anticipated evidence problems.

   [In addition,] At trial and prior to opening statements, each party shall submit the following to the trial judge:

   (a) copies of any Pretrial Information Exchange materials that have been exchanged pursuant to this rule, and any objections made thereto; and

   (b) stipulations reached on contested procedural, evidentiary and substantive issues[; and in jury trials;].

In addition, in jury trials, each party shall submit the following materials to the trial judge and, unless exchange of trial information has been waived in writing pursuant to *R.* 4:25-7(d), shall also submit the following materials to all other parties:

[(c)](a) any special voir dire questions;

[(d)](b) a list of proposed jury instructions with specific reference to the Model Civil Jury Charges, if applicable;

[(e)](c) any special jury instructions with applicable legal authority; and

[(f)](d) a proposed jury verdict form that includes all possible verdicts the jury may return.

Note: Appendix XXIII adopted July 5, 2000 to be effective September 5, 2000; introduction and paragraph 5. amended _____ to be effective _____.

Z. Proposed Amendments to *Rules* 4:36-2, 4:5B-1 and 4:25-4, and Appendix XXIV — re: Trial Information Statement

In accordance with the recommendations of the Conference of Civil Presiding Judges to refine certain civil best practices procedures, the Supreme Court issued an Order on July 2, 2001 relaxing and supplementing *Rules* 4:36-2, 4:5B-1 and 4:25-4 and Appendix XXIV to eliminate the requirement that each party file and serve a Trial Information Statement (TIS), as well as any reference to the TIS. The Committee recommends the proposed amendments to conform the rules and Appendix to the terms of the Supreme Court's Order.

The proposed amendments to *Rules* 4:36-2, 4:5B-1 and 4:25-4, and to Appendix XXIV follow.

4:36–2. [Trial Information Statement (TIS)] Notice of Expiration of Discovery Period

[(a) When Filed. Each party shall file and serve a Trial Information Statement (TIS) within ten days following the end of the discovery period, including any extension thereof. The court shall send a notice to each party of the date for filing and serving the TIS 30 days before the end of the discovery period. Said notice shall be sent in all actions pending on September 5, 2000 or commenced thereafter.

(b) Contents. The TIS shall be in the form prescribed in Appendix XXIV of these rules, shall certify that discovery is complete and shall identify designated trial counsel or confirm an earlier designation of trial counsel, pursuant to *R.* 4:25-4. If such designation is neither made nor confirmed, the right to designate trial counsel shall be deemed waived.

(c) Failure to File Trial Information Statement. If a party fails to file and serve a Trial Information Statement (TIS) as herein required, that party will be deemed to have waived any previously made designation of trial counsel; the court will assume that discovery is complete and will schedule the case for an arbitration hearing or for trial; and, absent exceptional circumstances, no adjournment of the arbitration or trial date for incomplete discovery will be granted.]

The court shall send a notice to each party to the action 60 days prior to the end of the prescribed discovery period. The notice shall advise that if an extension of the discovery period is required, application therefore must be made prior to its expiration and that if no such application is made, the action shall be deemed ready for trial. The notice shall also advise that if trial counsel has not yet been designated, that designation shall be made on written notice

to all parties and the court no later than ten days after the expiration of the discovery period or the right to designate trial counsel shall be deemed waived.

Note: Adopted July 5, 2000 to be effective September 5, 2000 (and former Rule 4:36-2 deleted); former rule and caption deleted, and new rule and caption adopted to be effective .

4:5B-1. Assignment for Case Management

At the time the complaint is filed, the action shall be assigned to a designated judge, who shall, except as otherwise provided by *R.* 4:24-1(c), preside over all pretrial motions and management conferences in the cause until [filing of the Trial Information Statement (TIS) prescribed] completion of discovery as provided by *R.* 4:36-2. Any application made to the court [after filing the TIS] thereafter shall be made to the Civil Presiding Judge or designee. In Track IV cases, however, the designated [pretrial] managing judge shall, insofar as is practicable and absent exceptional circumstances, also preside at trial.

Note: Adopted July 5, 2000 to be effective September 5, 2000, amended to be effective .

4:25–4. Designation of Trial Counsel

Counsel shall, either in the first pleading or in [the Trial Information Statement (TIS) required by *R.* 4:36-2] a writing filed no later than ten days after the expiration of the discovery period, notify [or confirm with] the court that designated counsel is to try the case, and set forth the name specifically. If [trial counsel is neither identified nor confirmed in the TIS] there has been no such notification to the court, the right to designate trial counsel shall be deemed waived[, even if a designation had previously been made]. No change in such designated counsel shall be made without leave of court if such change will interfere with the trial schedule. In tort cases pending for more than three years, however, the court, on such notice to the parties as it deems adequate in the circumstances, may disregard the designation if the unavailability of designated counsel will delay trial. If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case, when reached on the calendar.

Note: Source—*R.R.* 4:29–3A(a); amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; caption and text amended July 5, 2000 to be effective September 5, 2000; amended to be effective .

APPENDIX XXIV

TRIAL INFORMATION STATEMENT (*R.* 4:36-2)

(PLEASE SEE ATTACHED FORM)

[APPENDIX XXIV

CIVIL TRIAL INFORMATION STATEMENT (TIS)

IMPORTANT: The filing of this form is mandatory for all parties, pursuant to R. 4:36-2.

DOCKET NUMBER	CASE TYPE	TRACK

DOCKET NUMBERS OF ANY CONSOLIDATED CASES

CASE NAME Plaintiff Defendant

VS

ATTORNEY NAME, FIRM NAME AND ADDRESS	REPRESENTING (PARTY NAME)

DESIGNATED TRIAL COUNSEL (IMPORTANT: Trial counsel designation is waived if not made or confirmed on this form. See R. 4:25-4 and R. 4:36-2(c).	ATTORNEY PHONE NUMBER

Do parties consent to voluntary binding arbitration? ☐ Yes ☐ No

NAME OF DEFENDANT'S PRIMARY INSTURANCE COMPANY, IF KNOWN

☐ None ☐ Uknown

Dates unavailable within 90 days (attorneys, parties and witnesses):

DATES	REASON

ESTIMATED TOTAL LENGTH OF TRIAL	NUMBER OF WITNESSES Plaintiff _____ Defendant _____

Filing party must copy all other parties. Attach additional information if needed and check here _____.

I certify that discovery is complete and the case is ready for trial.

Date	Signature	Print or type name of signer

PLEASE ADVISE COURT OF DISABILITY OR LANGUAGE INTERPRETATION ACCOMMODATION NEEDS.]

Form Adopted July 5, 2000
CVLTIS.p65

Note: Appendix XXIV deleted _____ to be effective _____.

AA. Proposed Amendment to *R.* 4:36-3 — Trial Calendar

The Video Subcommittee, chaired by Alan Medvin, Esq., had recommended that *R.* 4:36-3(c) be amended to allow, upon all parties' consent, portions of a *de bene esse* deposition of an expert to be read to the jury in lieu of the expert appearing in person or on videotape.

This recommendation was endorsed by the Conference of Civil Presiding Judges and was implemented by the Supreme Court's July 2, 2001 Order relaxing and supplementing various court rules, including *R.* 4:36-3. The Committee now recommends amending *R.* 4:36-3 to conform to the terms of the Supreme Court's Order.

The proposed amendments to *R.* 4:36-3(c) follow.

4:36-3. Trial Calendar

(a) ...no change.

(b) ...no change.

(c) Adjournments, Expert Unavailability. If the reason stated for the initial request for an adjournment was the unavailability of an expert witness, no further adjournment request based on that expert's unavailability shall be granted, except upon a showing of exceptional circumstances, but rather that expert shall be required to appear in person or by videotaped testimony taken pursuant to R. 4:14-9 or, provided all parties consent, the expert's *de bene esse* deposition shall be read to the jury in lieu of the expert's appearance. If appropriate, given the circumstances of the particular case, the court may order that no further adjournments will be granted for the failure of any expert to appear.

Note: Adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (c) adopted September 12, 2000 to be effective immediately; paragraph (c) amended _____ to be effective _____.

BB. Proposed Amendment to *R.* 4:42-11 — Interest in Tort Actions; Rate on Judgments; in Tort Actions

Following its consideration of the appeal in *McKeand v. Gerhard*, 331 *N.J. Super*. 122 (App. Div.) *certif. granted*, 165 *N.J.* 529, *appeal dismissed* 167 *N.J.* 618 (2001), the Supreme Court referred to the Civil Practice Committee the issue of prejudgment interest on future lost wages and future damages for pain and suffering.

The Committee's discussions of this issue ranged over several meetings. One view expressed was that there should be no distinction, for purposes of assessing prejudgment interest, among the various elements of damage in a personal injury case. Once liability is established, the plaintiff is entitled to compensation for all losses, from the time of the accident. As plaintiff does not have, during the prejudgment period, the use of the money which, if the verdict is in plaintiff's favor, is due him or her, awarding prejudgment interest compensates for this loss.

A contrary view held that, as prejudgment interest is intended to compensate plaintiff for the lost use of monies in the period **prior** to judgment, the concept cannot rationally be applied to losses that have not yet happened.

Granting prejudgment interest on future losses, however, encourages settlement. The public policy of encouraging settlement may, alone, be sufficient rationale for permitting prejudgment interest on future losses.

The Committee was divided on the issue of allowing prejudgment interest on future economic losses. Reports were submitted stating the views of both sides. The basic issue under consideration was whether, for purposes of prejudgment interest, future losses should be treated differently from past and present losses, keeping in mind that the primary rationale of the Supreme Court for granting prejudgment interest on future losses in *Ruff v. Weintraub*, 105 *N.J.* 233 (1987) was the promotion of settlement. One view was that, in the absence of any empirical proof that prejudgment interest promotes settlement, the award should make the plaintiff whole. The other view was that the Court had been awarding prejudgment interest for thirty years and there did not seem to be any valid reason to change the policy. The Chair posed three questions for the Committee's consideration. First, she asked if there should be a distinction between economic and non-economic losses for purposes of determining prejudgment interest on future losses. A large majority of the Committee said there should be no distinction. The second question was whether there should be prejudgment interest on future non-economic losses. A large majority of the Committee voted that prejudgment interest should be awarded on future non-economic losses. The third question was whether prejudgment interest should be awarded on future economic losses. The Committee voted that it should. Therefore, the Committee agreed that the long-standing practice of awarding prejudgment interest on future economic and non-economic losses should continue, and proposes an amendment to *R.* 4:42-11 to clarify the issue.

Included as Appendix C to this report are summaries of the majority and minority reports prepared by Judge Pressler, a separate summary submitted by the minority, and the full text of the majority and minority reports.

The proposed amendments to *R.* 4:42-11 follow.

4:42–11. Interest; Rate on Judgments; in Tort Actions

(a) ...no change.

(b) Tort Actions. Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest, calculated as hereafter provided, from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. Prejudgment interest shall be added to the entire damages award, including economic and non-economic past and future losses, and shall be calculated in the same amount and manner provided for by paragraph (a) of this rule except that for all periods prior to January 1, 1988 interest shall be calculated at 12% per annum. The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

Note: Adopted December 21, 1971 to be effective January 31, 1972. Paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (a) and (b) amended July 29, 1977 to be effective September 6, 1977; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended November 2, 1987 to be effective January 1, 1988; paragraph (a)(ii) amended and paragraph (a)(iii) added June 28, 1996 to be effective September 1, 1996; paragraph (b) amended _____ to be effective _____.

CC. Proposed Amendments to *R.* 4:43-1 — Entry of Default

Rule 4:43-1 states that the clerk **shall** enter default against a party whose answer has been stricken. The comment to the rule notes that this provision was included "to make it clear that if an answer is stricken by court order because of failure to comply with the discovery rules . . ., the clerk should enter default forthwith upon presentation of a copy of the order, and the matter should then proceed to final judgment by default pursuant to *R.* 4:43-2."

Rule 4:23-5, however, grants a party whose pleading has been stricken for failure to provide discovery 90 days to move to vacate the order striking the pleading. Indeed, the structure of *R.* 4:23-5 contemplates that the party whose pleading has been stricken will provide the discovery and will move to have the suppression order vacated. This appears to be in conflict with the mandate of *R.* 4:43-1, which, if followed, would put the case into default.

The Committee recommends that the apparent conflict be resolved by adding the words "with prejudice" to "if the answer has been stricken" in the first sentence of *R.* 4:43-1.

The proposed amendments to *R.* 4:43-1 follow.

4:43–1. Entry of Default

If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or court order, or if the answer has been stricken with prejudice, the clerk shall enter a default on the docket as to such party. Except where the default is entered on special order of the court, the moving party shall make a formal written request of the clerk for the entry of the default, supported by the attorney's affidavit. The affidavit shall recite the service of the process and copy of complaint on the defendant or defendants (if more than one, naming them), the date of service as appears from the return of the process, and that the time within which the defendant or defendants may answer or otherwise move as to the complaint, counterclaim, cross-claim, or third-party complaint has expired and has not been extended. The request and affidavit for entry of default shall be filed together within 6 months of the actual default, and the default shall not be entered thereafter except on notice of motion filed and served in accordance with *R.* 1:6 on the party in default. If defendant was originally served with process either personally or by certified or ordinary mail, the attorney obtaining the entry of the default shall send a copy thereof to the defaulting defendant by ordinary mail addressed to the same address at which defendant was served with process.

Note: Source—*R.R.* 4:56–1(a) (b) (c) (d); amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended to become effective .

DD. Proposed Amendments to *R.* 4:43-2 — Final Judgment by Default

Rule 4:43-2 sets forth the procedure to be followed in "comparative negligence actions" in which one or more defendants default and one or more answer. Liability is compared in cases other than negligence, however — *e.g.*, intentional tort, products liability, etc. Thus, the classification used in the text of the rule may be too narrow.

The Committee agreed that the phrase "comparative negligence actions," now in the rule, should be changed to "tort actions involving multiple defendants whose percentage of liability is subject to comparison..."

The Committee also recommends eliminating the reference to "incompetent" persons, now in the rule, and substituting the term "mentally incapacitated" person. See also Section I. JJ., *infra*.

The proposed amendments to *R.* 4:43-2 follow.

4:43–2. Final Judgment by Default

When a default has been entered in accordance with *R.* 4:43–1, except as otherwise provided by *R.* 4:64 (foreclosures), a final judgment may be entered in the action as follows:

(a) By the Clerk. If the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit setting forth a particular statement of the items of the claim, their amounts and dates, a calculation in figures of the amount of interest, the payments or credits, if any, and the net amount due, shall sign and enter judgment for the net amount and costs against such defendant, if not a minor or [incompetent] mentally incapacitated person. If prejudgment interest is demanded in the complaint the clerk shall add that interest to the amount due provided the affidavit of proof states the date of defendant's breach. If the judgment is based on a document of obligation that provides a rate of interest, prejudgment interest shall be calculated in accordance therewith; otherwise it shall be calculated in accordance with Rule 4:42–11(a). If the claim is founded upon a note, check or bill of exchange or is evidenced by entries in the plaintiff's book of account, or other records, a copy thereof shall be attached to the affidavit.

(b) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefore; but no judgment by default shall be entered against a minor or [incompetent] mentally incapacitated person unless that person is represented in the action by a guardian or guardian ad litem who has appeared therein. If the party against whom judgment

by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with notice of the motion for judgment filed and served in accordance with *R.* 1:6. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any allegation by evidence or to make an investigation of any other matter, the court may conduct such hearings with or without a jury or take such proceedings as it deems appropriate, and in that event, if the defendant was originally served with process either personally or by certified or ordinary mail, the attorney for the claimant shall give notice of the proof hearing to the defaulting defendant by ordinary mail addressed to the same address at which process was served. In [comparative negligence] tort actions involving multiple defendants whose percentage of liability is subject to comparison and actions in which fewer than all defendants have defaulted, default judgment of liability may be entered against the defaulting defendants but such questions as defendants' respective percentages of liability and total damages due plaintiff shall be reserved for trial or other final disposition of the action. If application is made for the entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel which has been repossessed, the plaintiff shall prove before the court the description of the property, the amount realized at the sale or credited to the defendant and the costs of the sale. In actions for possession of land, however, the court need not require proof of title by the plaintiff.

If application is made for the entry of judgment by default in negligence actions involving property damage only, proof shall be made as provided by *R.* 6:6–3(c).

(c) ...no change.

(d) ...no change.

Note: Source—*R.R.* 4:55–4 (first sentence), 4:56–2(a)(b) (first three sentences) (c), 4:79–4. Paragraph (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; text and paragraph (a) amended January 19, 1989 to be effective February 1, 1989; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (b) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraphs (b) and (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (d) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a) and (b) amended to be effective .

EE. Proposed Amendments to *R.* 4:69-1 — Actions in Superior Court, Law Division

The Conference of Assignment Judges referred to the Committee the question of whether actions in lieu of prerogative writs should be permitted to be filed in the Special Civil Part. The Conference asked the Committee to consider a rule amendment precluding such filings in the Special Civil Part.

The Committee agreed that the appropriate rule should be amended to make it clear that actions in lieu of prerogative writs should not be filed in the Special Civil Part.

See Section II. V. of this report for a discussion of proposed amendments to *R.* 4:69-1, which the Committee rejected.

The proposed amendments to *R.* 4:69-1 follow.

4:69–1. Actions in Superior Court, Law Division

Review, hearing and relief heretofore available by prerogative writs and not available under R. 2:2–3 or R. 8:2 shall be afforded by a civil action in the Law Division, Civil Part, of the Superior Court. The complaint shall bear the designation "In Lieu of Prerogative Writs".

Note: Source—R.R. 4:88–2 (first sentence), 4:88–3 (second sentence). Amended June 20, 1979 to be effective July 1, 1979; amended to be effective .

FF. Proposed Amendments to *R.* 4:86-1 — re: Complaint in Action for Guardianship

The Probate Subcommittee, chaired by the Hon. Patrick J. McGann, Jr. (Ret.), recommended that *R.* 4:86-1 be amended to require that the complaint in an action for guardianship state the name and address of any person designated as attorney-in-fact for the alleged mentally incapacitated person, as well as any person designated as a health care representative and any person acting as trustee under a trust for the benefit of the alleged mentally incapacitated person. The Committee supports the subcommittee's recommendation.

The Committee also recommends eliminating the reference to "incompetent" person, now in the rule, and substituting the term "mentally incapacitated" person. See also Section I. JJ., *infra*.

The proposed amendments to *R.* 4:86-1 follow.

RULE 4:86. ACTION FOR GUARDIANSHIP OF

[AN INCOMPETENT] A MENTALLY INCAPACITATED PERSON

OR FOR THE APPOINTMENT OF A CONSERVATOR

4:86–1. Complaint

Every action for the determination of mental [incompetency] incapacity of a person and for the appointment of a guardian of that person or of the person's estate or both, other than an action with respect to a veteran under N.J.S.A. 3B:13–1 et seq., shall be brought pursuant to *R.* 4:86–1 through *R.* 4:86–8. The complaint shall state the name, age, domicile and address of the plaintiff, of the alleged [incompetent] mentally incapacitated person and of the alleged [incompetent's] mentally incapacitated person's spouse, if any; the plaintiff's relationship to the alleged [incompetent] mentally incapacitated person; the plaintiff's interest in the action; the names, addresses and ages of the alleged [incompetent's] mentally incapacitated person's children, if any, and the names and addresses of the alleged [incompetent's] mentally incapacitated person's parents and nearest of kin; the name and address of the person or institution having the care and custody of the alleged [incompetent] mentally incapacitated person; and if the alleged [incompetent] mentally incapacitated person has lived in an institution, the period or periods of time the alleged [incompetent] mentally incapacitated person has lived therein, the date of the commitment or confinement, and by what authority committed or confined. The complaint shall also state the name and address of any person named as attorney-in-fact in any power of attorney executed by the alleged mentally incapacitated person, any person named as health care representative in any health care

directive executed by the alleged mentally incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged mentally incapacitated person.

Note: Source—*R.R.* 4:102–1. Amended July 22, 1983 to be effective September 12, 1983; former *R.* 4:83–1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended to be effective .

GG. Proposed Amendments to *R.* 4:86-4 — Order for Hearing

The Probate Subcommittee, chaired by the Hon. Patrick J. McGann, Jr. (Ret.), recommended that the Order for Hearing state the same information recommended to be included in the complaint. Namely, the Order should state the name and address of any person designated as attorney-in-fact for the alleged mentally incapacitated person, as well as any person designated as a health care representative and any person acting as a trustee under a trust for the benefit of the alleged mentally incapacitated person.

The Probate Subcommittee also recommended that *R.* 4:86-4 be amended to clarify what the report of counsel for the alleged mentally incapacitated person "may" and "shall" include.

The Committee endorses these proposed amendments and further recommends eliminating the reference to "incompetent" person, now in the rule, and substituting the term "mentally incapacitated" person. See also Section I. JJ., *infra*.

The proposed amendments to *R.* 4:86-4 follow.

4:86–4. Order for Hearing

(a) Contents of Order. If the court is satisfied with the sufficiency of the complaint and supporting affidavits and that further proceedings should be taken thereon, it shall enter an order fixing a date for hearing and requiring that at least 20 days' notice thereof be given to the alleged [incompetent] mentally incapacitated person, any person named as attorney-in-fact in any power of attorney executed by the alleged mentally incapacitated person, any person named as health care representative in any health care directive executed by the alleged mentally incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged mentally incapacitated person, the alleged [incompetent's] mentally incapacitated person's spouse, children 18 years of age or over, parents, the person having custody of the alleged [incompetent] mentally incapacitated person, the attorney appointed pursuant to *R.* 4:86–4(b), and such other persons as the court directs. Notice shall be effected by service of a copy of the order, complaint and supporting affidavits upon the alleged [incompetent] mentally incapacitated person personally and upon each of the other persons in such manner as the court directs. The court, in the order, may, for good cause, allow shorter notice or dispense with notice, but in such case the order shall recite the ground therefore, and proof shall be submitted at the hearing that the ground for such dispensation continues to exist. A separate notice shall, in addition, be personally served on the alleged [incompetent] mentally incapacitated person stating that if he or she desires to oppose the action he or she may appear either in person or by attorney and may demand a trial by jury.

(b) Appointment and Duties of Counsel. The order shall include the appointment by the court of counsel for the alleged [incompetent] mentally incapacitated person. Counsel shall 1) personally interview the alleged [incompetent]mentally incapacitated person; 2) make inquiry of persons having knowledge of the alleged [incompetent's] mentally incapacitated person's circumstances, his or her physical and mental state and his or her property; 3) make reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed by the alleged [incompetent] mentally incapacitated person or to discover any interests the alleged [incompetent] mentally incapacitated person may have as beneficiary of a will or trust. At least three days prior to the hearing date counsel shall file a report with the court and serve a copy thereof on plaintiff's attorney and other parties who have formally appeared in the matter. The report shall contain the information developed by counsel's inquiry; shall make recommendations concerning the court's determination on the issue of [incompetency including] mental incapacity; may make recommendations concerning the suitability of less restrictive alternatives such as a conservatorship or [limited guardianship] a delineation of those areas of decision-making that the alleged mentally incapacitated person may be capable of exercising; and whether a case plan for the mentally incapacitated person should thereafter be submitted to the court. The report shall further state whether the alleged [incompetent] mentally incapacitated person has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the court. The report shall also make recommendations concerning whether good cause exists for the court to order that any

power of attorney, health care directive, or revocable trust created by the alleged mentally incapacitated person be revoked or the authority of the person or persons acting thereunder be modified or restricted. If the alleged [incompetent] mentally incapacitated person obtains other counsel, such counsel shall notify the court and appointed counsel at least five days prior to the hearing date.

(c) Examination. If the affidavit supporting the complaint is made pursuant to *R.* 4:86–2(c), the court may, on motion and upon notice to all persons entitled to notice of the hearing under paragraph (a), order the alleged [incompetent] mentally incapacitated person to submit to an examination. The motion shall set forth the names and addresses of the physicians who will conduct the examination, and the order shall specify the time, place and conditions of the examination. Upon request, the report thereof shall be furnished to either the examined party or his or her attorney.

(d) Guardian Ad Litem. At any time prior to entry of judgment, where special circumstances come to the attention of the court by formal motion or otherwise, a guardian ad litem may, in addition to counsel, be appointed to evaluate the best interests of the alleged [incompetent] mentally incapacitated person and to present that evaluation to the court.

(e) Compensation. The compensation of the appointed counsel and of the guardian ad litem, if any, may be fixed by the court to be paid out of the estate of the alleged [incompetent] mentally incapacitated person or in such other manner as the court shall direct.

Note: Source—*R.R.* 4:102–4(a)(b). Paragraph (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; caption of former *R.* 4:83–4 amended, caption and text of paragraph (a) amended and in part redesignated as paragraph (b) and former paragraph (b) redesignated as paragraph (c) and amended, and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended and paragraphs (d) and (e) added June 28, 1996 to be effective September 1, 1996; paragraphs (a), (b), (c), (d), and (e) amended _____ to be effective _____.

HH. Proposed Amendments to *R.* 4:86-6 — Hearing; Judgment

The Probate Subcommittee, chaired by the Hon. Patrick, J. McGann, Jr. (Ret.), recommended that *R.* 4:86-6(c) be amended to follow the language of *N.J.S.A.* 3B:12-25 regarding the priority of persons to be appointed guardian, and to include a provision that the appointment order require the guardian to advise the Surrogate of any changes to the guardian's and ward's addresses, of major changes to the ward's health, and of the ward's death.

The Committee supports the proposed amendments and further recommends eliminating the reference to "incompetent" person, now in the rule, and substituting the term "mentally incapacitated" person. See also Section I. JJ., *infra*.

The proposed amendments to *R.* 4:86-6 follow.

4:86–6. Hearing; Judgment

(a) Trial. Unless a trial by jury is demanded by or on behalf of the alleged [incompetent] mentally incapacitated person, or is ordered by the court, the court without a jury shall, after taking testimony in open court, determine the issue of mental [incompetency] incapacity. If there is no jury, the court, with the consent of counsel for the alleged [incompetent] mentally incapacitated person, may take the testimony of a physician by telephone or may dispense with the physician's oral testimony and rely on the affidavits submitted pursuant to *R.* 4:86–2(b). Telephone testimony shall be recorded verbatim.

(b) ...no change.

(c) Appointment of Guardian. If a guardian of the person or of the estate or of both the person and estate is to be appointed, the court shall appoint and letters shall be granted to the mentally incapacitated person's spouse [or], if the spouse was living with the mentally incapacitated person as husband or wife at the time the mental incapacity arose, or to the mentally incapacitated person's next of kin[,]; or if none of them will accept the [letters or it is proven to the court] appointment or if the court is satisfied that no appointment from among them will be in the best interests of the [incompetent or his or her estate, then to such other proper person as will accept them] mentally incapacitated person, then the court shall appoint and letters shall be granted to such other person who will accept appointment as the court determines is in the best interests of the mentally incapacitated person. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with *R.* 4:96–1. The judgment appointing the guardian shall fix the amount of the bond, unless

dispensed with by the court. The order of appointment shall require the guardian of the estate to file with the court within [60] 90 days of appointment an inventory specifying all property and income of the [incompetent's] mentally incapacitated person's estate, unless the court dispenses with this requirement. Within this time period, the guardian of the estate shall also serve copies of the inventory on all next of kin and such other interested parties as the court may direct. The order shall also require the guardian to keep the Surrogate continuously advised of the whereabouts and telephone number of the guardian and of the mentally incapacitated person and to advise the Surrogate within 30 days of the mentally incapacitated person's death or of any major change in his or her status or health.

Note: Source–*R.R.* 4:102–6(a)(b)(c), 4:103–3 (second sentence). Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (c) of former *R.* 4:83–6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c) amended to be effective .

II. Proposed Amendments to *R.* 4:86-7 — Return to Competency

The Probate Subcommittee, chaired by the Hon. Patrick J. McGann, Jr. (Ret.) recommended that *R.* 4:86-7 be amended to provide guidance as to who should receive notice should the mentally incapacitated person regain mental capacity.

The Committee supports this proposed amendment and further recommends eliminating the reference to "incompetent" person, now in the rule, and substituting the term "mentally incapacitated" person. See also Section I. II., *infra*.

The proposed amendments to *R.* 4:86-7 follow.

4:86–7. [Return to Competency] Regaining Mental Capacity

Upon the commencement of a separate action or upon the filing of a motion in the original cause by the [incompetent] mentally incapacitated person or an interested person on his or her behalf, supported by affidavit and setting forth facts evidencing [return to competency the court shall] that the previously mentally incapacitated person is no longer mentally incapacitated, the court shall, on notice to the persons who would be set forth in a complaint filed pursuant to *R.* 4:86-1, set a date for hearing, take oral testimony in open court with or without a jury, and may render judgment that the person [has returned to competency] is no longer mentally incapacitated, that his or her guardian be discharged subject to the duty to account, and that his or her person and estate be restored to his or her control.

Note: Source—*R.R.* 4:102–7; former *R.* 4:83–7 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

JJ. Rules Governing Incompetency

N.J.S.A. 3B:1-2 was amended effective January 1998 to change the term "incompetent" as used in Title 3B to "incapacitated" person. When presented with proposed amendments to change "incompetent" wherever it appeared in the rules to "incapacitated" person, the Committee concluded that the term "incapacitated" person was not sufficiently descriptive and suggested that the term be further modified to "mentally incapacitated" person. At its February 26, 2001 Administrative Conference, the Court agreed with the Committee's proposal. Accordingly, the Committee approved the proposed amendments to the following rules, changing the term "incompetent" to "mentally incapacitated" person:

- *R.* 1:20-12. Incapacity and Disability
- *R.* 1:21-7. Contingent Fees (see Section I. I. of this report)
- *R.* 4:4-4. Summons; Personal Service; In Personam Jurisdiction (see Section I. O. of this report)
- *R.* 4:4-6. General Appearance; Acknowledgment of Service
- *R.* 4:11-1. Before Action
- *R.* 4:21A-7. Arbitration of Minor's and Incompetent's Claims
- *R.* 4:26-2. Minor or Incompetent Person
- *R.* 4: 34-2. Incompetency
- *R.* 4:43-2. Final Judgment by Default (see Section I. DD. of this report)
- *R.* 4:44-1. Venue; Filing
- *R.* 4:44-2. Medical Testimony
- *R.* 4:44-3. Hearing; Order; Expenses
- *R.* 4:48A. Judgments for Minors and Incompetent Persons
- *R.* 4:64-1. Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures
- *R.* 4:66. Sale or Mortgage of Infant's and Incompetent's Lands
- *R.* 4:83-3. Title of Action
- *R.* 4:83-4. Venue

- ! *R.* 4:86. Action for Guardianship of an Incompetent or for the Appointment of a Conservator (caption only; see Section I. FF. of this report)
- ! *R.* 4:86-1. Complaint (see Section I. FF. of this report)
- ! *R.* 4:86-2. Accompanying Affidavits
- ! *R.* 4:86-3. Disqualification of Physician
- ! *R.* 4:86-4. Order for Hearing (see Section I. GG. of this report)
- ! *R.* 4:86-5. Proof of Service; Appearance of Incompetent at Hearing; Answer
- ! *R.* 4:86-6. Hearing (see Section I. HH. of this report)
- ! *R.* 4:86-7. Return to Competency (see Section I. II. of this report)
- ! *R.* 4:86-8. Appointment of Guardian for Nonresident Incompetent
- ! *R.* 4:86-9. Guardians for Incompetents Under Uniform Veterans Guardianship Law
- ! *R.* 4:86-10. Appointment of Guardian for Persons Receiving Services From the Division of Developmental Disabilities
- ! *R.* 4:86-12. Special Medical Guardian
- ! *R.* 4:87-2. Complaint
- ! *R.* 4:87-4. Service
- ! *R.* 4:87-7. Report of Guardian Ad Litem
- ! *R.* 4:89-2. Complaint
- ! *R.* 4:94. Sale or Mortgage of Minor's and Incompetent's Lands (caption only)
- ! *R.* 4:94-1. Action for Sale
- ! *R.* 4:94-2. Complaint; Supporting Affidavits; Notice
- ! *R.* 4:94-4. Bond
- ! *R.* 4:94-5. Confirmation of Sale; Conveyance
- ! *R.* 4:94-6. Mortgage of Lands

The proposed amendments follow to those of the above-listed rules in which the only amendments are to change references from "incompetent" to "mentally incapacitated." Other rules so amended that also have other changes can be found elsewhere in Section I, as indicated in the above list.

1:20–12. Incapacity and Disability

(a) Disability Inactive Status; Effect of Judicial Determination of [Incompetency] Mental Incapacity or [on] Involuntary Commitment. When an attorney who is admitted to practice in this state has been judicially declared [incompetent] mentally incapacitated or involuntarily committed to a mental hospital, the Supreme Court, on proof of the fact, shall enter an order transferring the attorney to disability inactive status, effective immediately and until further order of the Court. Such transfer shall stay any pending disciplinary proceedings. When an attorney who has been transferred to disability inactive status is thereafter, in proceedings duly taken, judicially declared to be [competent]no longer mentally incapacitated, the Court may dispense with the need for further evidence that the disability has been removed and may direct reinstatement on such terms as are deemed proper and advisable. Any judge sitting in a court in this state who declares an attorney admitted to practice in this state [incompetent] mentally incapacitated, or who commits such attorney to a mental hospital, or who thereafter declares the attorney to be [competent] no longer mentally incapacitated shall, on entry of the final order, promptly forward a copy to the Director.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) ...no change.

(g) ...no change.

(h) ...no change.

Note: Adopted January 31, 1984 to be effective February 15, 1984; paragraph (g) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (b) caption and text amended, paragraphs (c) and (d) deleted, new paragraphs (c), (d) and (e) added and former paragraphs (e), (f) and (g) amended and redesignated (f), (g) and (h) November 7, 1988 to be effective January 2, 1989; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; former R. 1:20–9 redesignated as R. 1:20–12, paragraphs (a) through (h) amended January 31, 1995 to be effective March 1, 1995; paragraph (a) amended _____ to be effective _____.

4:4–6. General Appearance; Acknowledgment of Service

A general appearance or an acceptance of the service of a summons, signed by the defendant's attorney or signed and acknowledged by the defendant (other than an infant or [incompetent] mentally incapacitated person), shall have the same effect as if the defendant had been properly served.

Note: Source—*R.R.* 4:4–6; amended July 17, 1975 to be effective September 8, 1975; amended _____ to be effective _____.

4:11–1. Before Action

(a) ...no change.

(b) Notice and Service. At least 20 days before the date of hearing the petitioner shall serve upon each person named in the petition as an expected adverse party, in the manner provided by *R.* 4:4–4 and *R.* 4:4–5(a), a notice, with a copy of the petition attached, stating the time and place of the application for the order described in the petition. If it appears to the court after diligent inquiry that such service cannot be made, the court may order service by publication or otherwise, and shall appoint an attorney to represent persons so served, who, if such persons are not otherwise represented, may cross-examine the deponent. Such attorney's compensation may be fixed by the court and charged to the petitioner. The provisions of *R.* 4:26–2 apply if any expected adverse party is a minor or [incompetent] mentally incapacitated person.

(c) ...no change.

(d) ...no change.

Note: Source—*R.R.* 4:17-1. Paragraphs (c) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (c) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended to be effective .

4:21A–7. Arbitration of Minor's and [Incompetent's] Mentally Incapacitated Person's Claims

If all parties to the action accept the arbitration award disposing of the claim of a minor or [incompetent] mentally incapacitated person, the attorney for the guardian ad litem shall forthwith so report to the Assignment Judge and a proceeding for judicial approval of the award pursuant to R. 4:44 shall be held as expeditiously as possible.

Note: Adopted November 1, 1985 to be effective January 2, 1986; amended July 13, 1994 to be effective September 1, 1994; amended to be effective .

4:26–2. Minor or [Incompetent] Mentally Incapacitated Person

(a) Representation by Guardian. Except as otherwise provided by law or *R.* 4:26–3 (virtual representation), a minor or [incompetent] mentally incapacitated person shall be represented in an action by the guardian of either the person or the property, appointed in this State, or if no such guardian has been appointed or a conflict of interest exists between guardian and ward or for other good cause, by a guardian ad litem appointed by the court in accordance with paragraph (b) of this rule.

(b) Appointment of Guardian Ad Litem.

(1) Appointment of Parent in Negligence Actions. In negligence actions, unless the court otherwise directs, a parent of a minor or [incompetent] mentally incapacitated person shall be deemed to be appointed guardian ad litem of the child without court order upon the filing of a pleading or certificate signed by an attorney stating the parental relationship, the child's status and, if a minor, the age, the parent's consent to act as guardian ad litem and the absence of a conflict of interest between parent and child.

(2) Appointment on Petition. The court may appoint a guardian ad litem for a minor or an alleged [incompetent] mentally incapacitated person, upon the verified petition of a friend on his or her behalf. In an action in which the fiduciary seeks to have the account settled or has a personal interest in the matter, the petition shall state whether or not the guardian ad litem therein nominated was proposed by the fiduciary or the fiduciary's attorney. Each petition shall be accompanied by the sworn consent of the proposed guardian ad litem, stating his or her relationship to the minor or alleged [incompetent] mentally incapacitated person and

certifying that he or she has no interest in the litigation, or if such interest exists, setting forth the nature thereof, and that he or she will with undivided fidelity perform the duties of guardian ad litem, if appointed. The court shall appoint the guardian ad litem so proposed unless it finds good cause for not doing so, in which case it shall afford the petitioner opportunity to file a new petition seeking the appointment of another person within 10 days of the rejection. If such new petition is not filed within such time, or if filed, is not granted, the court, when designating some other person as guardian ad litem, shall state for the record its reasons for rejecting petitioner's nominee. A conflict of interest between the petitioner and the minor or alleged [incompetent] mentally incapacitated person shall be good cause for rejection of the petitioner's nominee. Only one guardian ad litem shall be appointed for all minors or alleged [incompetent] mentally incapacitated persons unless a conflict of interest exists.

(3) Appointment on Party's Motion. On motion by a party to the action, the court may appoint a guardian ad litem for a minor or alleged [incompetent] mentally incapacitated person if no petition has been filed and either default has been entered by the clerk or, in a summary action brought pursuant to *R.* 4:67 or in a probate action, 10 days have elapsed after service of the order. Notice of the motion shall be served at least 10 days before the return date fixed therein upon the appropriate persons designated in *R.* 4:4–4(a)(1)(2)(3) or (c) either personally, at the time of service of process or thereafter, or by registered or certified mail, return receipt requested. The court on ex parte motion may, in lieu thereof, fix such notice of the motion, given to such persons in such manner as it deems appropriate.

(4) Appointment on Court's Motion. The court may appoint a guardian ad litem for a minor or alleged [incompetent] mentally incapacitated person on its own motion.

(c) ...no change.

Note: Source—*R.R.* 4:30–2(a)(b)(c), 7:12–6; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b)(3) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a), (b)(1), (b)(2), (b)(3), and (b)(4) amended _____ to be effective _____.

4:34–2. [Incompetency] Mental Incapacity

If a party becomes [incompetent] mentally incapacitated, the court upon motion served as provided in *R.* 4:34–1(b) may allow the action to be continued by or against the party's guardian or guardian ad litem.

Note: Source—*R.R.* 4:38–2; amended July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

4:44–1. Venue; Filing

Actions brought in the Superior Court on behalf of a minor or [incompetent] mentally incapacitated person, instituted without process, for the purpose of obtaining the court's approval of a settlement shall be brought in any county in which the venue might be laid under *R.* 4:3–2, and in such actions in the Superior Court, the papers shall, unless the court otherwise orders, be filed with the deputy clerk of the Superior Court in the county of venue before the hearing on the application for approval.

Note: Source—*R.R.* 4:56A(a)(b); amended July 26, 1984 to be effective September 10, 1984; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended to be effective .

4:44–2. Medical Testimony

Medical testimony as to the injuries of a minor or [incompetent]mentallyincapacitated person given in proceedings to obtain the approval of a settlement shall be that of the attending or consulting physician and may be submitted by affidavit unless the court, for good cause shown, permits the testimony of other medical experts or in its discretion requires the physician's personal appearance.

Note: Source—*R.R.* 4:56A(c); amended July 13, 1994 to be effective September 1, 1994; amended to be effective .

4:44–3. Hearing; Order; Expenses

All proceedings to enter a judgment to consummate a settlement in matters involving minors and [incompetents] mentally incapacitated persons shall be heard by the court without a jury. The court shall determine whether the settlement is fair and reasonable as to its amount and terms. In the case of a structured settlement providing for deferral of all or part of the proceeds thereof, the court shall also satisfy itself, based on the financial security of the obligor or surety and such other relevant facts as may be adduced, of the reasonable certainty that all future payments will be made as proposed by the settlement. If the court approves the settlement it shall enter an order reciting the action taken and directing the appropriate judgment in accordance with *R.* 4:48A, whose provisions shall also apply to deferred payments under structured settlements. The court, on the request of the claimant or the claimant's attorney or on its own motion, may approve the expenses incident to the litigation, including attorney's fees. If the fees of the attorney representing the guardian ad litem are to be paid by the defendant, the defendant shall upon the court's request make available to it defendant's complete file in the action.

Note: Source—*R.R.* 4:56A(e). Amended July 7, 1971 to be effective September 13, 1971; amended May 3, 1988 to be effective immediately; amended July 13, 1994 to be effective September 1, 1994; amended to be effective .

4:48A. Judgments for Minors and [Incompetents] Mentally Incapacitated Persons

(a) ...no change.

(b) [Incompetent] Mentally Incapacitated Persons. If a judgment is in favor of [an incompetent] a mentally incapacitated person, the court shall by order either dispense with the giving of a bond by the guardian and direct that the proceeds of the judgment be deposited in court to be handled in the same manner as in the case of a minor, or make such other provision for the disposition of the proceeds of the judgment as may be in the best interest of the [incompetent] mentally incapacitated person.

(c) ...no change.

Note: Adopted July 7, 1971 to be effective September 13, 1971; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a) and (b) amended and paragraph (c) adopted June 29, 1990 to be effective September 4, 1990; paragraph (b) amended to be effective .

4:64–1. Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) Minors; [Incompetents] Mentally Incapacitated Persons; Military Service. Except as otherwise provided by law or by *R.* 4:26–3 (virtual representation), no judgment or order for redemption shall be entered under this rule against a minor or [incompetent]mentally incapacitated person who is not represented by a guardian or guardian ad litem appearing in the action. No judgment or order for redemption shall be entered against a defendant in military service of the United States who has defaulted by failing to appear unless that defendant is represented in the action by an attorney authorized by the defendant or appointed to represent defendant in the action and who has appeared or reported therein.

(g) ...no change.

Note: Source—*R.R.* 4:82–1, 4:82–2. Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; caption amended, paragraphs (a) and (b) caption and text amended, former paragraph (c) redesignated paragraph (e), and paragraphs (c), (d) and (f) adopted November 7, 1988 to be effective January 2, 1989; paragraphs (b) and (c) amended and paragraph (g) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (e) and (f) amended July 13, 1994 to be effective

September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) amended _____ to be effective _____.

4:66. Sale or Mortgage of Infant's and [Incompetent's] Mentally Incapacitated Person's Lands

[REDESIGNATED AS *R.* 4:94]

4:83–3. Title of Action

In all actions for the probate of a will, for letters of administration or guardianship of a minor or [incompetent] mentally incapacitated person and other actions brought pursuant to these rules, every paper shall be entitled "In the Matter of the Estate of _____, Deceased" or "In the Matter of _____ a Minor" or the like.

Note: Source—*R.R.* 4:117–4; caption and text of former *R.* 4:99–3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:83–4. Venue

(a) ...no change.

(b) Guardianships and Conservatorship Actions. In an action for the appointment of a guardian for an alleged [incompetent] mentally incapacitated person or of a conservator, venue shall be laid in the county in which the alleged [incompetent] mentally incapacitated person or conservatee is domiciled at the commencement of the action, or if at that time the person has no domicile in this State, then in any county in which the person has any property.

(c) ...no change.

(d) ...no change.

(e) ...no change.

Note: Source—*R.R.* 4:116–1 through 5. Former *R.* 4:98 deleted and new *R.* 4:83–4 adopted June 29, 1990 to be effective September 4, 1990; paragraph (b) amended _____ to be effective _____.

4:86–2. Accompanying Affidavits

The allegations of the complaint shall be verified as prescribed by *R.* 1:4–7 and shall have annexed thereto:

(a) An affidavit stating the nature, location and fair market value (1) of all real estate in which the alleged [incompetent] mentally incapacitated person has or may have a present or future interest, stating the interest, describing the real estate fully or by metes and bounds, and stating the assessed valuation thereof; and (2) of all the personal estate which he or she is, will or may in all probability become entitled to, including the nature and total or annual amount of any compensation, pension, insurance, or income which may be payable to the alleged [incompetent] mentally incapacitated person. If the plaintiff cannot secure such information, the complaint shall so state and give the reasons therefore, and the affidavit submitted shall in that case contain as much information as can be secured in the exercise of reasonable diligence;

(b) Affidavits of two reputable physicians, having qualifications set forth in N.J.S.A. 30:4–27.2t. If an alleged [incompetent] mentally incapacitated person has been committed to a public institution and is confined therein, one of the affidavits shall be that of the chief executive officer, the medical director, or the chief of service providing that person is also the physician with overall responsibility for the professional program of care and treatment in the administrative unit of the institution. However, where an alleged [incompetent] mentally incapacitated person is domiciled within this State but resident elsewhere, the affidavits may

be those of physicians who are residents of the state or jurisdiction of the alleged [incompetent's] mentally incapacitated person's residence. Each affiant shall have made a personal examination of the alleged [incompetent] mentally incapacitated person not more than 30 days prior to the filing of the complaint, but said time period may be relaxed by the court on an ex parte showing of good cause. To support the complaint, each affiant shall state: (1) the date and place of the examination; (2) whether the physician is a treating or examining physician; (3) whether the physician is disqualified under *R.* 4:86–3; (4) the diagnosis and prognosis and factual basis therefore; (5) for purposes of ensuring that the alleged [incompetent] mentally incapacitated person is the same individual who was examined, a physical description of the person examined, including but not limited to sex, age and weight; and (6) the affiant's opinion that the alleged [incompetent] mentally incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs and shall set forth with particularity the circumstances and conduct of the alleged [incompetent] mentally incapacitated person upon which this opinion is based, including a history of the alleged [incompetent's] mentally incapacitated person's condition. The affidavit should also include an opinion whether the alleged [incompetent] mentally incapacitated person is capable of attending the hearing and if not, the reasons for the individual's inability.

(c) In lieu of the affidavits provided for in paragraph (b), an affidavit of one reputable physician having the qualifications as required by paragraph (b), stating that he or she has

endeavored to make a personal examination of the alleged [incompetent] mentally incapacitated person not more than 30 days prior to the filing of the complaint but that the alleged [incompetent] mentally incapacitated person or those in charge of him or her have refused or are unwilling to have the affiant make such an examination. The time period herein prescribed may be relaxed by the court on an ex parte showing of good cause.

Note: Source—*R.R.* 4:102–2; former *R.* 4:83–2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a), (b), and (c) amended to be effective _____.

4:86–3. Disqualification of Physician

No affidavit shall be submitted by a physician who is related, either through blood or marriage, to the alleged [incompetent] mentally incapacitated person or to a proprietor, director or chief executive officer of any institution (except state, county or federal institutions) for the care and treatment of the mentally ill in which the alleged [incompetent] mentally incapacitated person is living, or in which it is proposed to place him or her, or who is professionally employed by the management thereof as a resident physician, or who is financially interested therein.

Note: Source—*R.R.* 4:102–3; former *R.* 4:83–3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:86–5. Proof of Service; Appearance of [Incompetent] Mentally Incapacitated Person at Hearing; Answer

Prior to the hearing, the plaintiff shall file proof of service of the notice, order for hearing, complaint and affidavits and proof by affidavit that the alleged [incompetent] mentally incapacitated person has been afforded the opportunity to appear personally or by attorney, and that he or she has been given or offered assistance to communicate with friends, relatives, or attorneys. The plaintiff or appointed counsel may produce the alleged [incompetent] mentally incapacitated person at the hearing or the court may direct the plaintiff to do so, unless the court finds that it would be prejudicial to the health of the alleged [incompetent] mentally incapacitated person or unsafe for the alleged [incompetent] mentally incapacitated person or others to do so. If the alleged [incompetent] mentally incapacitated person or any person receiving notice of the hearing intends to appear by an attorney, such person shall, not later than five days before the hearing, serve and file an answer to the complaint.

Note: Source—*R.R.* 4:102–5; caption and text of former *R.* 4:83–5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:86–8. Appointment of Guardian for Nonresident [Incompetent] Mentally Incapacitated Person

An action for the appointment of a guardian for a nonresident who has been or shall be found to be a [mental incompetent] mentally incapacitated person under the laws of the state or jurisdiction in which the [incompetent] mentally incapacitated person resides shall be brought in the Superior Court pursuant to *R.* 4:67. The plaintiff shall exhibit and file with the court an exemplified copy of the proceedings or other evidence establishing the finding. If the plaintiff is the duly appointed guardian, trustee or committee of the [mental incompetent] mentally incapacitated person in the state or jurisdiction in which the finding was made, and applies to be appointed guardian in this State, the court may forthwith appoint that person without issuing an order to show cause.

Note: Source—*R.R.* 4:102–8. Amended July 26, 1984 to be effective September 10, 1984; former *R.* 4:83–8 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:86–9. Guardians for [Incompetents] Mentally Incapacitated Persons Under Uniform Veterans Guardianship Law

(a) Complaint for Appointment. An action for the appointment of a guardian under N.J.S.A. 3B:13–1 et seq. for a ward alleged to be a [mental incompetent] mentally incapacitated person shall be brought in the Superior Court by any person entitled to priority of appointment. If there is no person so entitled or if the person so entitled fails or refuses to commence the action within 30 days after the mailing of notice by a federal agency to the last known address of such person entitled to priority of appointment, indicating the necessity for the appointment, the action may be brought by any person residing in this State, acting on the ward's behalf.

(b) Complaint. The complaint shall state (1) the name, age and place of residence of the ward; (2) the name and place of residence of the nearest relative, if known; (3) the name and address of the person or institution, if any, having custody of the ward; (4) that such ward is entitled to receive money payable by or through a federal agency; (5) the amount of money due and the amount of probable future payments; and (6) that the ward has been rated [incompetent] a mentally incapacitated person on examination by a federal agency in accordance with the laws regulating the same.

(c) Proof of Necessity for Guardian of [Mental Incompetent] Mentally Incapacitated Person. A certificate by the chief officer, or his or her representative, stating the fact that the ward has been rated [incompetent] a mentally incapacitated person by a federal agency on

examination in accordance with the laws and regulations governing such agency and that appointment is a condition precedent to the payment of money due the ward by such agency shall be prima facie evidence of the necessity for making an appointment under this rule.

(d) Determination of Mental [Incompetency] Incapacity. Mental [incompetency] incapacity may be determined on the certificates, without other evidence, of two medical officers of the military service or of a federal agency, certifying that by reason of mental [incompetency] incapacity the ward is incapable of managing his or her property, or certifying to such other facts as shall satisfy the court as to such [incompetency] mental incapacity.

(e) Appointment of Guardian; Bond. Upon proof of notice duly given and a determination of mental [incompetency] incapacity, the court may appoint a proper person to be the guardian and fix the amount of the bond. The bond shall be in an amount not less than that which will be due or become payable to the ward in the ensuing year. The court may from time to time require additional security. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with R. 4:96–1.

(f) Termination of Guardianship When Ward [Becomes Competent] Regains Mental Capacity. If the court has appointed a guardian for the estate of a ward, it may subsequently, on due notice, declare the ward to [be competent] have regained mental capacity on proof of

a finding and determination to that effect by the medical authorities of the military service or federal agency or based on such other facts as shall satisfy the court as to the [competency] mental capacity of the ward. The court may thereupon discharge the guardian without further proceedings subject to the settlement of his or her account.

(g) ...no change.

(h) ...no change.

Note: Source—*R.R.* 4:102–9(a) (b) (c) (d) (e) (f) (g) (h), 4:103–3 (second sentence). Paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) through (f) and (h) of former R. 4:83–9 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (a), (b), (c), (d), (e) and (f) amended to be effective _____.

4:86–10. Appointment of Guardian for Persons Receiving Services From the Division of Developmental Disabilities

An action pursuant to N.J.S.A. 30:4–165.7 et seq. for the appointment of a guardian for a person over the age of 18 who is receiving services from the Division of Developmental Disabilities shall be brought pursuant to these rules insofar as applicable, except that:

(a) ...no change.

(b) In lieu of the affidavits prescribed by *R.* 4:86–2 the verified complaint shall have annexed thereto two affidavits. One affidavit shall be submitted by the chief executive officer, medical director, or other officer having administrative control over a Division of Developmental Disabilities program servicing the alleged [incompetent]mentally incapacitated person and the other shall be submitted by a physician licensed to practice in New Jersey or a psychologist licensed pursuant to N.J.S.A. 45:14B–1, et seq. The affidavit shall set forth with particularity the alleged [incompetent]mentally incapacitated person's significant chronic functional impairment, as that item is defined in N.J.S.A. 30:4–165.8, and the facts supporting the affiant's belief that as a result thereof, the person lacks the cognitive capacity either to make decisions or to communicate decisions to others.

(c) If the petition seeks guardianship of the person only, the Office of the Public Defender, if available, shall be appointed as attorney for the alleged [incompetent] mentally incapacitated person, as required by *R.* 4:86–4. If the Office of the Public Defender is unavailable or if the petition seeks guardianship of the person and the estate, the court shall

appoint an attorney other than the Public Advocate to represent the alleged [incompetent] mentally incapacitated person. The attorney for the alleged [incompetent] mentally incapacitated person may where appropriate retain an independent expert to render an opinion respecting the [incompetency] mental incapacity of the alleged [incompetent] mentally incapacitated person.

(d) The hearing shall be held pursuant to *R.* 4:86–6 except that a guardian may be summarily appointed if the attorney for the alleged [incompetent] mentally incapacitated person, by affidavit, does not dispute either the need for the guardianship or the fitness of the proposed guardian and if a plenary hearing is not requested either by the alleged [incompetent] mentally incapacitated person or on his or her behalf.

Note: Adopted July 7, 1971 to be effective September 13, 1971; amended July 24, 1978 to be effective September 11, 1978. Former rule deleted and new rule adopted November 5, 1986 to be effective January 1, 1987; caption amended and paragraphs (b), (c) and (d) of former *R.* 4:83–10 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraphs (b), (c) and (d) amended _____ to be effective _____.

4:86–12. Special Medical Guardian

(a) Standards. On the application of a hospital, nursing home, treating physician, relative or other appropriate person under the circumstances, the court may appoint a special guardian of the person of a patient to act for the patient respecting medical treatment consistent with the court's order, if it finds that:

(1) the patient is [incompetent] mentally incapacitated, unconscious, underage or otherwise unable to consent to medical treatment;

(2) ...no change.

(3) ...no change.

(4) ...no change.

(b) ...no change.

(c) ...no change.

(d) ...no change.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraphs (a), (b) and (c) of former *R.* 4:83–12 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(1) amended to be effective .

4:87–2. Complaint

The complaint in an action for the settlement of an account

(a) shall contain the names and addresses of all persons interested in the account, including any surety on the bond of the fiduciary, specifying which of them, if any, are minors or [incompetent] mentally incapacitated persons, the names and addresses of their guardians, or if there is no guardian then the names and addresses of the parents or persons standing in loco parentis to the minors;

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

Note: Source—*R.R.* 4:106–1. Paragraph (e) adopted June 29, 1973 to be effective September 10, 1973; former *R.* 4:87–1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (a) amended _____ to be effective _____.

4:87–4. Service

(a) Process shall be the order to show cause. If the names and addresses of all parties interested in the account are known, the order to show cause together with a copy of the complaint, both certified by plaintiff's attorney to be true copies, shall be mailed by registered or certified mail, return receipt requested, as follows: to all such persons who reside in the State at least 20 days prior to the return date; to all such persons who reside outside this State but within a state of the United States or the District of Columbia, at least 30 days prior to the return date; and to all such persons who reside outside the United States at least 60 days prior to the return date. If any person interested is a minor or [incompetent] mentally incapacitated person and except as otherwise provided by *R.* 4:26–3 (virtual representation), service shall be made on the person or persons upon whom a summons would have to be served pursuant to *R.* 4:4–4(a)(2) and (3) unless a guardian ad litem is required under *R.* 4:26–2. A surety on the fiduciary's bond shall be deemed an interested person. Upon the request of any interested party a copy of the account shall be furnished by the fiduciary prior to the date of hearing.

(b) ...no change.

(c) ...no change.

Note: Source—*R.R.* 4:106–3. Former *R.* 4:87–3 deleted and new *R.* 4:87–4 adopted June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended to be effective _____.

4:87–7. Report of Guardian Ad Litem

A guardian ad litem for a minor or [incompetent] mentally incapacitated person shall file a written report with the court at least 7 days prior to the day on which the account is settled. If the guardian applies for the allowance of a fee in excess of $1,000 the report shall include, or be accompanied by, an affidavit of services. Notice of all applications for allowances shall be given as provided by *R.* 4:26–2(c).

Note: Source—*R.R.* 4:106–5A; former *R.* 4:87–6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:89–2. Complaint

In actions for distribution the complaint shall state: (a) when letters, if any, were granted to a fiduciary; (b) the names and addresses of all persons interested, specifying which of them are minors or [incompetent] mentally incapacitated persons; and in actions for the distribution of an intestate's estate, the manner and degree in which the next of kin severally stand related to the intestate; (c) the balance in the fiduciary's hands for distribution, so far as the same may be known; and (d) shall have annexed to the complaint a copy of the will or other instrument, if any, pursuant to which distribution is to be made.

Note: Source—*R.R.* 4:108–2; amended June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

RULE 4:94 SALE OR MORTGAGE OF MINOR'S AND [INCOMPETENT'S]

MENTALLY INCAPACITATED PERSON'S LANDS

4:94–1. Action for Sale

A general guardian of the person or property of a minor or [incompetent] mentally incapacitated person or, if the general guardian shall fail to act or has an adverse interest or other good cause exists, a guardian ad litem appointed by the court after notice to the general guardian, or any person having a vested interest in lands in which a minor, [incompetent] mentally incapacitated person, or person not in being has an interest, may bring an action in the Superior Court for the sale or other disposition of the property of the minor, [incompetent] mentally incapacitated person or person not in being. Nothing in these rules shall be deemed to authorize the sale or other disposition of any property contrary to the provisions of any will or conveyance by which the same were bequeathed, devised or granted to or for the benefit of the minor or [incompetent] mentally incapacitated person.

Note: Source—*R.R.* 4:84–1 (first sentence), 4:84–2 (fifth sentence). Amended July 7, 1971 to be effective September 13, 1971; amended July 22, 1983 to be effective September 12, 1983; former *R.* 4:66–1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended to be effective .

4:94–2. Complaint; Supporting Affidavits; Notice

The complaint shall state the age and residence of the ward, a description of the property proposed to be sold or otherwise disposed of, a statement of the encumbrances, if any, thereon, and the reasons why the sale or other disposition would be in the ward's best interests. The complaint shall be verified by affidavit made pursuant to *R.* 1:6–6 and have annexed thereto affidavits of at least two persons, stating the situation, assessed value, if any, and fair market value of the property proposed to be sold or otherwise disposed of, and if real estate, of each separate lot or parcel. If, however, the minor or [incompetent] mentally incapacitated person owns a fractional portion of real estate having a value not in excess of $10,000 as shown by one affidavit, the court may dispense with the requirement of a second affidavit as to value. Unless the court otherwise orders, no notice of the action need be given to the ward.

Note: Source—*R.R.* 4:84–1 (second and third sentences); former *R.* 4:66–2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:94–4. Bond

If sale or other disposition is made by a guardian ad litem, the proceeds thereof shall not be paid to him or her, but to the guardian who has filed a bond in an adequate amount. The court on directing the sale or other disposition of property shall examine the sufficiency of the bond previously given by the general guardian or the special guardian for real or personal property within this State of the nonresident minor or [incompetent] mentally incapacitated person, and if in the court's judgment the same is insufficient, or if no bond has been previously given, the court shall require the guardian or special guardian to give an additional bond approved by it before the confirmation of the sale, or as it directs. If the guardian or special guardian was appointed by a court other than the Superior Court of New Jersey, then before the confirmation there shall be presented a certificate of such appointing court, certifying that a good and sufficient bond, of a stated amount, has been filed with it.

Note: Source—*R.R.* 4:84–2 (fourth sentence), 4:84–3; former *R.* 4:66–4 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:94–5. Confirmation of Sale; Conveyance

The report, notice and order for the confirmation of a sale or other disposition of property shall be in accordance with *R.* 4:65–6 dealing with real estate, except that the order to sell may dispense with a confirmation of the sale in case of a private sale. If the report is filed within 6 months after the hearing or application under *R.* 4:94–3, it need not have annexed to it affidavits as to the value of the property sold. The conveyance to be made pursuant to the order confirming sale, when duly executed and delivered, shall vest in the purchaser as good an estate in the property as the minor or [incompetent] mentally incapacitated person could have conveyed if at the time of conveyance such person were of full age and sound mind.

Note: Source—*R.R.* 4:84–4; former *R.* 4:66–5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:94–6. Mortgage of Lands

Actions in the Superior Court under any statute providing for the borrowing of money on the security of, or the exchange of, any real estate of a minor, [incompetent] mentally incapacitated person or other person, shall be commenced by filing a verified complaint of the guardian or other person authorized to proceed under the statute, and shall conform with the provisions of *R.* 4:94 insofar as they are applicable. If the action is to mortgage land, the court shall also ascertain the manner in which it is proposed to meet the interest to accrue upon the mortgage. If it appears that the best interests of the minor, [incompetent] mentally incapacitated person or other person would be promoted by selling the real estate rather than by mortgaging it, the court in its discretion may direct the guardian or other designated person to take such proceedings to sell the whole or any part of the same.

Note: Source—*R.R.* 4:84–5; amended July 26, 1984 to be effective September 10, 1984; former *R.* 4:66–6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

KK. Proposed "Housekeeping" Amendments to *Rules* 1:21-2, 4:21A, 4:54, 4:59-1, and 4:67-2

The Civil Practice Committee recommends "housekeeping" amendments to the following rules:

R. 1:21-2 — to change the use of lower case roman numerals in subsection (a)(3) to *R.* 1:21-2(a)(3) to upper case letters, to conform with the standard format of the Rules of Court.

R. 4:21A — to conform the caption to the topics covered by the rule. See also Section I. V. of this report for a discussion of recommended amendments to the text of *R.* 4:21A-1.

R. 4:54 — to change the inaccurate references to *Rules* 4:86-1 and 4:86-2 to *Rules* 4:87-1 and 4:87-2, respectively.

R. 4:59-1 — to eliminate the obsolete reference to the county clerk.

R. 4:67-2 — to change and correct the rule reference regarding service of an Order to Show Cause from *R.* 4:52-1(a) to *R.* 4:52-1(b).

The proposed "housekeeping" amendments to *Rules* 1:21-2, 4:21A, 4:54, 4:59-1, and 4:67-2 follow.

1:21–2. Appearances *Pro Hac Vice*

(a) Conditions for Appearance. An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual or a member or employee of a partnership or an employee of a professional corporation or limited liability entity authorized to practice law in such other jurisdiction, or an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law, may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice*, to speak in such matter in the same manner as an attorney of this state who maintains a bona fide office for the practice of law in this state and who is therefore, pursuant to *R.* 1:21–1(a), authorized to practice in this state. No attorney shall be admitted under this rule without annually complying with *R.* 1:20–1(b) and *R.* 1:28– 2 during the period of admission. An application for admission *pro hac vice* shall be made on motion to all parties in the matter.

(1) ...no change.

(2) ...no change.

(3) In civil actions the motion shall be granted only if the court finds, from the supporting affidavit, that there is good cause for such admission, which shall include at least one of the following:

[(i)]A. the cause in which the attorney seeks admission involves a complex field of law in which the attorney is a specialist, or

[(ii)]B. there has been an attorney-client relationship with the client for an extended period of time, or

[(iii)]C. there is a lack of local counsel with adequate expertise in the field involved, or

[(iv)]D. the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

[(v)]E. there is need for extensive discovery or other proceedings in the foreign jurisdiction in which the applicant is licensed, or

[(vi)]F. such other reason similar to those set forth in this subsection as would present good cause for the *pro hac vice* admission.

(b) ...no change.

(c) ...no change.

(d) ...no change.

Note: Source—*R.R.* 1:12–8. Amended December 16, 1969 effective immediately; caption and text amended November 27, 1974 to be effective April 1, 1975; amended January 10, 1979 to be effective immediately; former rule amended and redesignated as paragraphs (a) and (b) and paragraph (c) adopted July 22, 1983 to be effective September 12, 1983; paragraph (a) amended January 31, 1984 to be effective February 15, 1984; new paragraph (c) adopted and former paragraph (c) redesignated as paragraph (d) November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2) and (3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1)(iv) added June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iii), and (a)(1)(iv)

amended and redesignated as (a)(1)(A), (a)(1)(B), (a)(1)(C), and (a)(1)(D) July 5, 2000 to be effective September 5, 2000; paragraph (a) amended to be effective .

RULE 4:21A. ARBITRATION OF CERTAIN [PERSONAL INJURY] CIVIL ACTIONS

RULE 4:54. ASSIGNMENTS FOR BENEFIT OF CREDITORS

The practice relating to assignments for the benefit of creditors under *N.J.S.* 2A:19–1 *et seq*. shall conform as nearly as practicable to the procedure relating to insolvent corporations. Accounts of assignees for the benefit of creditors shall be settled pursuant to *R.* [4:86-1] 4:87-1and [4:86-2] 4:87-2.

Note: Source—*R.R.* 4:69; amended _____ to be effective _____.

4:59–1. Execution

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) Wage Executions; Notice, Order, Hearing. Proceedings for the issuance of an execution against the wages, debts, earnings, salary, income from trust funds or profits of a judgment debtor shall be on notice to the debtor. The notice of wage execution shall state (1) that the application will be made for an order directing a wage execution to be served upon the defendant's named employer, (2) the limitations prescribed by 15 U.S.C.A. §§ 1671–1677, inclusive and N.J.S. 2A:17–50 et seq. and N.J.S. 2A:17–57 et seq. on the amount of defendant's salary which may be levied upon, (3) that defendant may notify the [county clerk] court and the plaintiff in writing within 10 days after service of the notice of reasons why the order should not be entered, and (4) if defendant so notifies the clerk, the application will be set down for hearing of which the parties will receive notice as to time and place, and if defendant fails to give such notice, the order will be entered as of course. The judgment creditor may waive in writing the right to appear at the hearing on the objection and rely on the papers. The notice of wage execution shall be served on the judgment debtor in accordance with *R.* 1:5–2. A copy of the notice of application for wage execution, together with proof of service in accordance with *R.* 1:5–3, shall be filed with the clerk at the time the form of order for wage execution is submitted. No order shall be entered unless the form of order was filed within 45 days of service of the notice or 30 days of the date of the hearing. If an objection from the judgment

debtor is received by the clerk after a wage execution has issued, all moneys remitted by the employer shall be held until further order of the court and the matter shall be set down for a hearing to be held within 7 days of receipt of the objection.

(e) ...no change.

(f) ...no change.

(g) ...no change.

Note: Source—*R.R.* 4:74–1, 4:74–2, 4:74–3, 4:74–4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b), (c), (d), and (e) redesignated (c), (d), (e) and (f) respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21, 1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (c), (e), (f), and (g) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended June 28, 1996 to be effective June 28, 1996; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (e), and (g) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended to be effective .

4:67–2. Complaint; Order to Show Cause; Motion

(a) Order to Show Cause. If the action is brought in a summary manner pursuant to *R.* 4:67–1(a), the complaint, verified by affidavit made pursuant to *R.* 1:6–6, may be presented to the court ex parte and service shall be made pursuant to *R.* 4:52–1[(a)] (b), except that if the action is pending in the Law Division of the Superior Court, it shall be presented to the Assignment Judge or to such other judge as the Assignment Judge designates. The proceeding shall be recorded verbatim provided that the application is made at a time and place where a reporter or sound recording device is available. The court, if satisfied with the sufficiency of the application, shall order the defendant to show cause why final judgment should not be rendered for the relief sought. No temporary restraints or other interim relief shall be granted in the order unless the defendant has either been given notice of the action or consents thereto or it appears from the specific facts shown by affidavit or verified complaint that immediate and irreparable damage will result to the plaintiff before notice can be served or informally given. The order shall be so framed as to notify the defendant fully of the terms of the judgment sought, and subject to the provisions of *R.* 4:52, it may embody such interim restraint and other appropriate intermediate relief as may be necessary to prevent immediate and irreparable damage.

(b) ...no change.

Note: Source—*R.R.* 4:85–2. Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended _____ to be effective _____.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to *R.* 1:2-4 — Sanctions; Failure to Appear; Motions and Briefs

The Sanctions Subcommittee, chaired by the Hon. Bette E. Uhrmacher, recommended the amendment of *R.* 1:2-4 to allow the court to assess monetary sanctions against a party who violates any obligation imposed by a court rule or court order. After considerable discussion, the Committee determined that the current rules are sufficient to address delinquencies, and so does not recommend any rule amendments to provide for additional sanctions.

B. Proposed Amendments to *R.* 1:6-2 — Form of Motion; Hearing

An attorney asked that current practice be changed to allow litigants the opportunity of learning the reasons for the judge's granting or denial of a motion without having to pay for a transcript of reasons placed on the record in the parties' absence. Many judges reserve decision on motions, then put their decisions on the record in chambers at a later time or date. Some judges advise attorneys of when this will be done, to give them an opportunity to be present to hear the court's decision. Sometimes attorneys order an unofficial copy of the tape; this can be done at very low cost and helps the attorney decide whether to order a transcript. The Committee determined that a rule amendment is not a necessary or appropriate way to address the issue and referred the matter to the Conference of Civil Presiding Judges.

C. Proposed Amendments to *R.* 1:6-3 — Filing and Service of Motions and Cross-Motions

A trial judge recommended that the *R.* 6:3-3(c) requirements for the contents of a notice of motion be incorporated into *R.* 1:6-3, at least when the motion is addressed to *pro se* litigants.

The Committee was of the view that there is no problem in Law Division that would necessitate such an amendment.

In addition, the Chair of the Conference of Civil Presiding Judges, on behalf of the Conference as a whole, requested that the Civil Practice Committee consider amending *R.* 1:6-3 to change the time periods for filing motions from 16 to 18 days before the specified return date; and for filing any opposing affidavits, certifications or objections from 8 to 10 days before the return date; and for filing any reply papers from 4 to 6 days before the return date. The Conference unanimously supported such a change, as motion papers are often delayed in reaching the judge because of internal security and fiscal procedures established to screen mail and process fees.

The Committee opposed changing a court rule to remedy an internal administrative problem. See Section II. S., *infra*, for discussion of a similar amendment proposed to *R.* 4:46-1, which the Committee also rejected.

D. Proposed Amendments to *R.* 1:6-5 — Briefs

The Conference of Civil Presiding Judges had recommended a page limit on briefs in the trial courts.

The Committee did not support the proposal, taking the position that there is no pressing problem with the length of briefs that needs to be addressed.

E. Proposed Amendments to *R.* 1:11-2 — Withdrawal or Substitution

An attorney suggested amending *R.* 1:11-2 to address the circumstances of an attorney's desire to withdraw from a case without the client's consent.

The Committee determined that no change to the rule should be made. An attorney cannot withdraw without the client's consent, absent the court's approval. A request for withdrawal without the client's consent would have to be made by motion and handled by the court on a case-by-case basis. The Committee further notes that withdrawal issues are governed by RPC 1.16.

F. Proposed Amendments to *R.* 1:21-7 — Contingent Fees

An attorney representing workers compensation carriers requested an amendment to *R.* 1:21-7 to require that the carrier be notified of an attorney's application for an enhanced fee when a workers compensation lien exists.

The Committee members declined to recommend this amendment because they felt that a carrier's interest in the attorney's fee structure did not rise to a level that would require an amendment to the rule.

See Section I. I. of this report for a discussion of proposed amendments to this rule, which the Committee recommends.

G. Proposed Amendments to *Rule* 1:36 — Opinions; Filing, Publication

The Committee was asked to consider whether *R.* 1:36 should be reexamined in light of the holding in *Anastasoff v. United States*, 223 F3d 898 (8th Circ. 2000), in which the court held that courts cannot bar the use of unpublished or unreported decisions. The Committee concluded that no amendments to *R*. 1:36 were necessary and agreed not to engage in any further reexamination of the issue at this time. It should also be noted that the holding in *Anastasoff* was vacated by the 8th Circuit sitting *en banc* (235 F3d 1054) and that the publication rule continues to govern in the 8th Circuit, *Andrews v. Neer*, 253 F3d 1052 (2001).

See Section I. J. of this report for a discussion of proposed amendments to *R.* 1:36-3, which the Committee recommends.

H. Proposed Amendments to *R.* 2:6-10 — Format of Briefs and Other Papers

An attorney advised that the relaxation (and subsequent amendment) of *R.* 2:6-10 to permit only two transcript pages to be reproduced on one sheet adds nothing to readability (as the two sheets are produced in the same size and format as when four sheets per page were permitted), wastes 50% of the paper used, and doubles the volume and weight of the compressed transcript. She recommended returning to the four-page format.

The Committee rejected this proposal because the instruction to the official court reporters is to produce two-page transcripts with one compressed page on the entire upper half of an 8½" x 11" sheet, and the second compressed page on the entire bottom half. The Appellate Division Clerk's Office does not accept transcripts in any other format.

I. Proposed Amendments to *R.* 2:9-6 — Supersedeas Bond; Exceptions

In *Courvoisier v. Harley Davidson of Trenton, Inc.*, 162 *N.J.* 153 (1999), the Supreme Court asked the Civil Practice Committee to review the "good cause" provisions of *R.* 2:9-6 to determine if any amendments are necessary to address the issues raised in the appeal.

A subcommittee, chaired by Alan Medvin, Esq., concluded that the issues addressed by the Supreme Court in the opinion are substantive rather than procedural, and so should not be the subject of a court rule. Nonetheless, attorneys and judges should be aware of the *Rova Farms* issues involved in setting the amount of the bond. Judge Pressler has noted the *Courvoisier* case in her comments to the rule.

J. Proposed Amendments to Rules 4:4-3 and 4:4-4 — re: Service of Process

An attorney advised that some judges will not enter default judgment when sheriff's service has failed, service by mail is made pursuant to *R.* 4:4-3(b) or *R.* 4:4-4(b)(1)(C) and the post office has confirmed, through an FOIA inquiry, that the mail is delivered. These judges require a court order authorizing service by mail. The attorney suggested that this situation be rectified in the rules or in the comments.

The Committee does not support the proposal, taking the position that the rules are clear; no court order authorizing service by mail is necessary in the above-noted situation.

K. Proposed Amendments to *R.* 4:4-4 — Summons; Personal Service; In Personam Jurisdiction

The president of the New Jersey Professional Process Servers Association (NJPPSA) proposed an amendment to *R.* 4:4-4(b)(1)(A) to allow service of process in another state by any person authorized to serve initial process under *R.* 4:4-3, *i.e.*, a private process server. The Committee is of the view that such an amendment is not necessary.

The president of Guaranteed Subpoena Service, Inc. asked for advice as to whether *R.* 4:4-4 permits a private process server who is unable to effect personal service to make service by mail, and suggested that *R.* 4:4-4 be amended to clarify the issue.

The Committee took the position that the rules clearly do not permit a private process server to make mailed service. In this regard, private process servers are in the same position as sheriff's officers, who may make personal but not mailed service. Accordingly, the Committee does not recommend any amendment to *R.* 4:4-4.

L. Proposed Amendments to *R.* 4:5-1 — General Requirements for Pleadings

In *Vision Mortgage Corp., Inc. v. Patricia J. Chiapperini, Inc.*, 156 *N.J.* 580 (1999), the Supreme Court asked the Civil Practice Committee to consider whether *R.* 4:5-1(b)(2) ("Notice of Other Actions and Potentially Liable Persons") should be revised further to require that counsel inform the court of other potential claims against the same party.

The Committee determined that no such revision is necessary. The notice provision incorporated into *R.* 4:5-1 is intended to substitute for the elimination of the requirement for compulsory joinder of persons. The requirement for the compulsory joinder of claims still remains, as set forth in *R.* 4:27-1.

After considering the Committee's recommendation, the Supreme Court inquired whether *R.* 4:27-1 applied to the *Vision Mortgage* situation, where multiple claims arose out of many different defective appraisals. The Committee again concluded that the entire controversy doctrine is clear and preclusive as to claims, and that *Vision Mortgage* does not necessitate further rule amendments.

M. Proposed Amendments to Rules Governing Discovery

The Discovery Subcommittee, chaired by S. Robert Allcorn, Esq., considered amendments to the following rules governing discovery:

R. 4:10 — re: Pretrial Discovery. The subcommittee considered whether, in light of *McKenney v. Jersey City Medical Center*, 330 *N.J. Super*. 568 (App. Div. 2000), a general rule should be promulgated, within *R.* 4:10, to impose a continuing obligation to advise the adversary of changes or additions to discovery, obtained by any mode. The subcommittee did not recommend amending the rules to extend the obligation to supplement to **all** discovery, especially depositions. The Committee agrees that the *McKenney* obligation to supplement discovery should not be codified in the rules.

R. 4:14-3 — Examination and Cross-Examination; Record of Examination; Oath; Objections. The chair of the Discovery Subcommittee noted that while the comments to *R.* 4:14-3 attempted to clarify the conditions under which an attorney may consult with his or her witness during a deposition, some ambiguity still remains as to this issue. Nonetheless, the subcommittee did not recommend any change to the rule. The Committee concurs, noting that the current rule prohibiting attorney-client consultation during the course of a deposition is difficult enough to enforce as it is. The Committee further commented that the remedy for an attorney who believes the adversary is using deposition breaks to confer with the client is to telephone the judge.

Rules 4:17-4 and 4:18-1 — re: Completeness of Discovery Responses. An attorney had requested rule amendments to require an insurance company representative to certify to the completeness of a defendant's discovery response. The subcommittee declined to amend the rules, finding that there was no problem with the current rules. The Committee concurs with the subcommittee's recommendation that no rule change is necessary. See Sections I. R. and I. U. of this report for proposed amendments to *Rules* 4:17-4 and 4:18-1, which the Committee recommends.

Similarly, an attorney requested that *R.* 4:18-1 be amended to require that a party responding to a Notice to Produce must certify as to the accuracy and completeness of the response, just as the party responding to interrogatories must do.

The certification would place the responsibility on the responding party to make sure that the material being submitted is responsive and complete. The subcommittee recommended, and the full Committee agreed, that a rule amendment was not necessary and would not remedy the problem of incomplete responses.

R. 4:17-5 — Objections to Interrogatories. The subcommittee considered a proposal for a rule amendment to require that objections to interrogatories must be specific so as to allow the propounder the opportunity to reframe the question. The subcommittee determined that no change to the rules is necessary, as the parties are required to confer prior to any motion relating to interrogatories. Any issues relating to the form of interrogatory questions should be resolved during that conference.

The Committee agrees that no change to *R.* 4:17-5 is necessary.

Uniform Demand for Production of Documents. The subcommittee noted that in the Uniform Interrogatories for person injury actions, both plaintiffs and defendants must "identify all documents that may relate to this action, and attach copies of each such document," and recommended that a similar interrogatory be included in the Uniform Interrogatories for property damage.

The subcommittee further recommended that requests for production of documents be prohibited in all cases (except product liability matters) in which uniform interrogatories are required.

The Committee determined to make no change to the rules, noting that a duplicative demand to produce under *R.* 4:18-1 could be answered by a statement that the documents have already been identified and produced in response to the Uniform Interrogatories.

N. Proposed Amendments to *R.* 4:14-6 — Certification and Filing by Officer; Exhibits; Copies

The Certified Shorthand Reporters Association of New Jersey recommended amendments to *Rules* 4:12-4 and 4:14-6 to incorporate the language of proposed regulations governing Certified Shorthand Reporters regarding disqualification for interest of all persons under contract to or in a financial relationship with one of the parties in a case. The Committee has recommended an amendment to *R.* 4:12-4 (see Section I. S. of this report) to make all the regulations governing certified shorthand reporters applicable to uncertified reporters as well. Accordingly, there is no need to amend *R.* 4:14-6 to include the specific language of the regulations.

O. Proposed Amendments to *R.* 4:14-9 — Videotaped Depositions

Rule 4:14-9(a) states that a videotaped deposition of an expert, intended for use in lieu of live testimony at trial, shall not be noticed for taking until 30 days after the expert's written report has been provided to all parties. Any party desiring to take a discovery deposition of that witness must do so within that 30-day period. Under civil best practices, discovery must be completed within the period associated with the track to which the case is assigned. Also under civil best practices, videotaped depositions of experts may be required if it appears the expert will not be available on a rescheduled trial date. Such videotaped depositions, however, are generally scheduled to occur after the discovery end date has passed — they are not intended as a discovery mechanism but rather as a way to avoid a second adjournment because of an expert's unavailability. Nonetheless, attorneys are apparently requesting to take discovery depositions of experts whose testimony is being videotaped for a rescheduled trial date, even though the discovery period has ended.

The Conference of Civil Presiding Judges considered this issue and concluded that, barring exceptional circumstances, all discovery must be completed within the track-allotted discovery period plus any consensual or court-ordered extensions. Thus, an adversary's request to take a discovery deposition of an expert whose testimony is being videotaped for a rescheduled trial date should not routinely be granted.

The Committee agreed with the Conference's position and determined that the rule was sufficiently clear and did not require an amendment.

P. Proposed Amendments to *R.*4:24-1 — Time for Completion of Discovery

The Conference of Civil Presiding Judges recommended that *R.*4:24-1(a) be amended to make it clear that the 450-day discovery period in Track IV cases is presumptive, and may be shortened or enlarged by order of the managing judge.

The Committee views such an amendment as unnecessary, as the managing judge has the inherent discretion to shorten or enlarge the discovery period.

Q. Proposed Amendments to *R.* 4:37-4 — Costs of Previously Dismissed Action

In *Watts v. Camaligan*, 344 *N.J. Super*. 453 (App. Div. 2001), the Appellate Division panel referred to the Committee the question of whether a rule amendment should be proposed, requiring "...a plaintiff, who files a subsequent complaint with a compliant certification, to nevertheless pay sanctions sufficient to reimburse the defendant for expenses incurred in defending a prior lawsuit dismissed without prejudice for failure to comply with the physician certification requirement of *N.J.S.A.* 39:6A-8a."

The Committee determined that there is no need to change the current rule.

R. Proposed Amendment to *Rules* 4:43-1 and 4:43-2 — re: Default/Default Judgment

The Committee was asked to consider whether a default and a default judgment could be applied for and entered simultaneously (a one-step process) or must they be handled separately to allow for notice and response (a two-step process).

At present, a one-step process seems to be followed if damages are liquidated, whereas when damages are unliquidated, a proof hearing must be scheduled and noticed, thereby necessitating a two-step process.

The Committee agreed that there is no need to change the current procedure and so does not recommend any rule amendments to address this issue.

S. Proposed Amendments to *R.* 4:46-1 — re: Time for Filing Motions

The Chair of the Conference of Civil Presiding Judges proposed that *R.* 4:46-1 be amended to change the time periods for filing a motion for summary judgment from 28 to 30 days before the return date, for filing opposition from 10 to 12 days and for filing answers to opposition papers from 4 to 6 days. The Conference unanimously supported such a change, as motion papers are often delayed in reaching the judge because of internal security and fiscal procedures established to screen mail and process fees.

The Committee voted overwhelmingly against extending the time limitations contained in the rule, taking the position that court rules should not be amended to correct internal administrative problems within the vicinages. See Section II. C. of this report for discussion of a similar amendment proposed to *R.* 1:6-3, which the Committee also rejected.

T. Proposed Amendments to *R.* 4:58 — Offer of Judgment

City of Cape May v. Coldren, 329 *N.J. Super*. 1 (App. Div. 2000) questioned whether the Offer of Judgment rule applies to surviving counts or claims following entry of an order either for partial summary judgment or otherwise dismissing other counts. The Committee noted that the *Coldren* case both raised the question and decided it; thus, no rule amendment is needed.

Subsequently, an attorney suggested that *R.* 4:58-1 be amended to make it clear that only a further offer that is more favorable to the adversary constitutes a withdrawal of a previous offer. The Committee determined that no such rule change is needed. The posture of the case may be different when the subsequent offer is made, *e.g.*, certain claims may have been withdrawn or settled. As result, the subsequent offer may appropriately be lower than the original offer. The current language of the rule is intended to address this situation.

See Section IV. C. of this report for a discussion of other Offer of Judgment issues that the Committee considered in the 2000-2002 term.

U. Proposed Amendments to *R.* 4:69-1 — Actions in Superior Court, Law Division

An attorney proposed amending *R.* 4:69-1 to prohibit joinder of any other causes of action, such as damage claims, with prerogative writ cases.

The Committee did not support the proposed amendment, noting that under civil best practices actions in lieu of prerogative writs are individually case managed. The managing judge can determine on a case-by-case basis whether particular claims should be severed or reserved.

See Section I. EE. of this report for a discussion of proposed amendments to *R.* 4:69-1, which the Committee recommends.

V. Proposed Amendments to *R.* 4:69-6 — Limitation on Bringing Certain Actions

The Committee reconsidered a proposal, initially submitted in 1994 by the Land Use Section of the State Bar, to create a uniform procedure for settling prerogative writ actions involving land use issues. After considerable study by a subcommittee, the Committee rejected the proposal in its 1996 report to the Supreme Court. Upon reconsidering the proposal at the request of one of its authors, the Committee is not inclined to change its position, which was expressed in the 1996 report, of allowing the settlement of actions in lieu of prerogative writs involving land use issues to be governed by the process of adjudicatory decision-making.

W. Proposed Amendments to *R.* 4:80-6 — Notice of Probate of Will

An Appellate Division judge recommended amending the first sentence of *R.* 4:80-6 to make it clear that the personal representative, if also a beneficiary, need not mail himself or herself notice that the will is in probate.

The Committee does not support this proposal, finding no need for such an amendment.

X. Proposed Amendments to *R.* 4:86-2 — Accompanying Affidavits

Counsel to the New Jersey Psychological Association requested that *R.* 4:86-2 be amended to provide that the two affidavits required in support of a determination of mental incapacity be those of a physician and a psychologist instead of two physicians, as currently mandated.

The Committee does not support the proposal. The Committee's position is that a psychologist's affidavit would be of little value if a cause of the alleged mental incapacity is physiological rather than psychological.

Y. Tabbing Exhibits

A trial judge recommended a rule change requiring that exhibits be tabbed. The Committee does not favor such an amendment, viewing it as unnecessary.

Z. Standards for Stay of Trial Court Orders

An Assignment Judge had raised the question of whether there should be a rule setting forth standards for the grant by the trial court of a stay of its own order pending appeal. Although standards might be difficult to formulate as stays are usually fact-specific, a rule might be drafted that sets forth the factors to be considered, such as likelihood of success and relative prejudice.

The Committee takes the position that such a rule is not needed. The judge must exercise his or her discretion in light of the facts of each particular case, and the general standards to be applied are adequately set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982).

III. OTHER RECOMMENDATIONS

A. Proposed Amendments to *Rules* 4:59-1(g) and 6:7-1(b), and Notice to Debtor Form — re: Exempt Property

A trial judge recommended that federal and state student loan proceeds should be explicitly exempt from attachment. The Committee agreed, but noted that such exemption is a matter of legislation. The Committee recommends state legislation consistent with the federal legislation that exempts student assistance funds from attachment.

B. Appointment of Substitute Trustee — *R.* 4:84-1

Pursuant to the Supreme Court's November 6, 1995 Order relaxing *R.* 4:84-4, Surrogates now have the authority to appoint substituted trustees. The Probate Subcommittee, chaired by the Hon. Patrick J. McGann, Jr. (Ret.), unanimously recommended that the relaxation Order be vacated and that the authority to appoint a substitute trustee be vested only in a Supreme Court judge pursuant to *R.* 4:84-4.

The Committee endorses the Subcommittee's recommendation.

IV. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendments to *Rules* 1:5-2, 1:5-3, 1:5-4 and 4:59-1 — re Sufficient Proof of Service

In *Morristown Memorial Hospital v. Tureo*, 329 *N.J. Super*. 154 (App. Div. 2000), the Appellate Division affirmed the trial court's denial of a motion for wage execution for insufficient proof of service. The trial court decision stated that the proof must recite either that the certified or registered mail was accepted on a certain date or that the certified or registered mail was refused or not accepted and was followed by ordinary mail service on a specific date. A joint subcommittee of the Civil Practice Committee and the Special Civil Part Practice Committee was established to examine this issue. The matter is under consideration pending a forthcoming Supreme Court decision on this issue.

B. Proposed Amendments to *Rules* 4:10-2 or 4:23-5 — Re: Types of Discovery Governed by *R.* 4:23-5

The Committee was asked to consider whether *R.* 4:23-5 should be amended to except violations of *R.* 4:10-2 (Request for Admissions) and *R.* 4:11-1 and -2 (Depositions Before Action or Pending Appeal) as grounds for dismissal for failure to provide discovery.

The Committee agreed that *R.* 4:23-5 should be amended to clarify what is not included under the umbrella of that rule and will address this matter in the future, along with related issues regarding failure to make discovery.

C. Proposed Amendments to *R.* 4:58-3 — Consequences of Non-Acceptance of Offer of Party Not a Claimant

The Committee considered whether *R.* 4:58-3 should be amended to make it clear that a token or nominal offer of judgment does not, if rejected, result in an award of counsel fees in both liquidated and unliquidated damages situations. If the purpose of the rule is to encourage settlement, this purpose is not furthered if the plaintiff is allowed to benefit from a token offer.

The consensus of the Committee was to allow case law to develop under the current rule, which is relatively new in its present form, and to study the whole Offer of Judgment rule and how it works in the next term.

See Section II. T. of this report for a discussion of other proposed amendments to *R.* 4:58, which the Committee does not recommend.

D. Proposed Amendments to *R.* 4:70 — Summary Proceedings for Collection of Statutory Penalties

The Committee was asked if it were time, in light of recently enacted legislation dealing with penalty enforcement, to consider revisions to *R.* 4:70, which now seems to generate considerable confusion in those seeking to proceed under the rule. The Director of the Division of Law is looking into this issue and will present a recommendation regarding the potential amendment or elimination of this rule in the next term.

E. Proposed Amendments to *R.* 4:74-7 — Civil Commitment -- Adults

The Director of the Division of Mental Health and Guardianship Advocacy of the Office of the Public Defender requested changes to the rules governing civil commitment for inmates to include an emergency procedure in order to avoid the use of stale orders and to bring the procedure into compliance with the statutory requirement that the person be presented for admission within three days of the completion of the clinical certificates. He also requested an amendment to provide inmates subject to transfer to the Ann Klein Forensic Center in non-emergent situations with a new pre-hospitalization hearing procedure containing all the protections afforded civilians facing involuntary psychiatric hospitalization.

The Director of the Division of Law is investigating this issue. The Committee determined not to take any action on the proposed amendment until the Director's report has been submitted and reviewed.

V. MISCELLANEOUS MATTERS

A. Child Support Lien Legislation

N.J.S.A. 2A:175.23b, effective August 2000, requires a lien to be placed on net proceeds payable to a prevailing party in a civil suit, or upon settlement of a civil suit, when that party is found to be a child support judgment debtor. The legislation states that the Supreme Court may adopt rules necessary to effectuate the purposes of the act.

The Committee is of the view that no court rules need be amended or adopted in response to the legislation.

B. Uniform Application and Enforcement of the Rules of Court

An attorney suggested that a directive be issued stating that the Rules of Court are to be enforced and applied as written, and must be strictly construed. He further suggested that a "simplified and expedited" procedure be developed whereby issues dealing with the interpretation of a rule would be appealed directly to and decided by the Supreme Court.

The Committee does not support these proposals.

C. *Jackson Township Board of Education v. Jackson Township Education Association*, 334 *N.J. Super*. 162 (App. Div. 2000)

The Appellate Division panel deciding the above-mentioned case referred to the Civil Practice Committee the issue of the propriety of an administrative agency appearing as a party in an appeal of its decision.

The Committee concluded that the long-standing practice of PERC's participation in certain appeals is supported by court *Rules* 2:5-1 and 2:6-4, statutes and case law, and that no change to this practice is warranted.

D. *Rosenblum v. Borough of Closter,* 333 *N.J. Super*. 385 (App. Div. 2000)

Judge Stern, P.J.A.D., asked that the Committee consider whether the policy put forth in the above-noted opinion — namely, that in certain circumstances an Assignment Judge may enjoin the filing of a complaint deemed to be frivolous — is appropriate and if so, the procedures to be utilized.

The Committee took the position that a litigant cannot be enjoined from filing a complaint, but that the Assignment Judge or General Equity judge may issue an order to show cause why the complaint should not be dismissed or the summons not served. The *pro se* litigant can then be heard and the court can make a determination as to how, or if, the case should proceed. The consensus of the Committee is that no rule is needed; the issue should be allowed to develop through case law.

E. Jurors Submitting Questions

The Committee recommends that, if the Court approves the amendments to *R.* 1:8-8 allowing the court the discretion of permitting juror questioning of witnesses for purposes of clarification, the preliminary and final instructions given to jurors in the juror pilot should be used and that they should be referenced in an official comment to the rule.

The Committee has referred the pilot instructions to the Model Civil Jury Charge Committee for its review.

See Section I. F. of this report for a discussion of the Committee's recommendation to amend *R.* 1:8-8 to allow juror questioning of witnesses.

F. Fee Shifting in Public Litigation

In the 1998-2000 term, the Committee established a subcommittee, chaired by the Hon. Amy Piro Chambers, to study a proposal submitted by Professor Frank Askin and the Rutgers Law School — Newark Constitutional Litigation Clinic, on behalf of numerous interest groups, to amend the Rules of Court to provide for the award of counsel fees to a prevailing litigant who has vindicated an important right affecting the public interest. The subcommittee presented an initial report in February 1999. It recommended that the proposal be rejected. A minority of the subcommittee, however, supported a proposal that would permit fee shifting if the plaintiff were successful in pursuing a claim under the New Jersey Constitution.

At its meeting on March 8, 1999, the Committee considered the majority and minority reports. The Committee was equally split and the Subcommittee was asked to investigate the issue further.

On February 7, 2000, the Committee considered the subcommittee's supplemental report in which the positions of the majority and minority remained essentially unchanged. The Committee voted 16 to 10 **against** recommending the minority proposal as a matter of policy, but agreed that if the Court were to favor a fee shifting procedure along the lines of the minority proposal, it should be done by legislation rather than court rule.

The Supreme Court, upon consideration of the subcommittee's reports, returned the matter to the Committee with the following four questions to be answered:

1. What is California's cost and actual experience under its fee-shifting legislation?

The subcommittee found little empirical data to answer this question because California does not break out and analyze separately the cost to the state for litigation under its fee shifting statute. The consensus of the subcommittee was that even if cost data were available, it would have little relevance to New Jersey where the fee shifting proposal was limited to the vindication of rights protected by the New Jersey Constitution.

2. What resources does New Jersey now have to bring public interest suits (e.g., are private firms developing public interest units)?

The subcommittee's research indicated that public interest litigation in New Jersey has been brought by a wide variety of organizations and individuals, including non-profit organizations, New Jersey chapters of national organizations, *pro bono* work of private law firms, the State Attorney General's Office and Legal Services of New Jersey.

3. If fee-shifting were allowed in cases in which a right under the New Jersey Constitution was vindicated, what types of suits would be brought that are not now being brought? That is, is there a real problem in New Jersey in getting such suits brought?

The subcommittee concluded that the number and types of cases now being brought would appear to indicate that New Jersey has a healthy climate for public interest litigation, but

felt that it was not in a position to evaluate either the adequacy or sufficiency of the current resources.

4. Would a pilot be feasible?

The consensus of the subcommittee was that a pilot would not be feasible.

The complete report containing the answers to these questions, as well as the original and supplemental reports which were submitted to the Court in the 1998-2000 term, are contained in Appendix D to this report.

The Committee stands by its original recommendation contained in the previously submitted report, namely, that the majority of the Committee does not favor a fee-shifting proposal as a matter of policy, but if such a proposal were to be adopted, it should be done by legislative fiat rather than by court rule.

Respectfully submitted,

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